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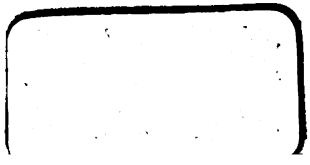
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A

PRACTICAL TREATISE

ON

THE LAWS

RELATING TO

THE CHURCH AND THE CLERGY.

BY

HENRY WILLIAM CRIPPS, M.A.

OF LINCOLN'S INN AND THE MIDDLE TEMPLE, BARRISTER AT LAW,
AND FELLOW OF NEW COLLEGE, OXFORD.

LONDON:

S. SWEET, 1, CHANCERY LANE,

Law Bookseller and Publisher.

HODGES AND SMITH, GRAFTON ST. DUBLIN.

1845.

LEW. Eng. c. 13 e. 1

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TO

THE RIGHT REVEREND

JAMES HENRY, LORD BISHOP,

AND TO

THE CLERGY,

OF

THE DIOCESE OF GLOUCESTER AND BRISTOL,

The following Treatise

IS

MOST RESPECTFULLY DEDICATED

BY

THE AUTHOR.

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PREFACE.

In the following pages it has been endeavoured, as far as possible, to combine two objects; and to compile a legal work which should be at the same time one of easy reference to the Lawyer and of practical utility to the Clergyman. For this reason, the author has, in many instances, to request the especial indulgence of the former, to whom it might otherwise appear that matters of history, of elementary law, and of practice, occupy too considerable space. The more important decisions of the Ecclesiastical Courts have also, in many instances, been inserted at greater length than might appear necessary for elucidating the particular proposition to which they refer. All such matters have been introduced for the purpose of rendering the present work a Complete and Practical Guide to the Clergy: and many of the more important judgments, especially those of Lord Stowell, could scarcely have been further abridged without taking away much of their utility; as they will often be found to afford a safe guidance upon other matters than those actually decided, and upon questions which may not hitherto have arisen.

A very considerable part of the contents of the present work is taken from and is a digest of the statute law. The several recent statutes on church matters have been condensed and analyzed as far as possible: but there is

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much which it was found impossible to condense without rendering it obscure: and in cases where the directions of the statutes require to be accurately observed, it has been thought best to give the very words of the enactments. In other cases, and especially in the different Church Building Acts, where much has been from time to time re-enacted without apparent reason, and where much which is not actually repealed, is nevertheless practically useless, such a course would only have perplexed: and it has been thought sufficient in such cases to give the substance only of what is now in force.

The author has also to express his thanks to the several clergymen who have furnished him with many useful suggestions and much practical information; and for the ready manner in which such information has invariably been given. It is hoped, that in consequence of such communications nothing which can safely be affirmed, and which can be of legal interest or importance to their profession, will be found omitted in the following work.

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BOOK I.

OF PERSONS ECCLESIASTICAL.

CHAPTER I.

OF THE CHURCH OF ENGLAND—THE CHURCH ESTABLISHMENT—AND THE QUEEN'S SUPREMACY.

The word Church.

The Church, as is well known, in its most extended sense, signifies all those who are by profession Christians, all believers in the Gospel generally, who constitute the visible Church of Christ on earth.[a] But it has also a more limited meaning, in which it is used in the latter part of the nineteenth of our Articles, in which it signifies only the Christians of one country, city, or persuasion. In this latter sense we use it in this work; in which we are speaking only of the Church of England: a particular Church included in an universal. But it has occasioned much difficulty and confusion, that the term by which in this case we designate the particular and universal, is the same; and has been very generally used indiscriminately.

Probably neither of these meanings can be taken as the primary one of the word Church, as it is of the Greek ἐκκλησία, and of the word thence derived in the Latin, for there the primary idea is evidently the elect, or the assembly, or the general body of the faithful: secondarily only, the temple or place where they meet together for religious worship. Our word, which is nearly similar to that of most of the northern nations, was probably formerly pronounced with the consonants hard, as now in Scotland, and derived from the Greek τὸ κυριακὸν, belonging to the Lord, or as it has been further, with probability, suggested, κυρίου δῖκος, or οἰκία, the Lord's House, thence applied secondarily to those who there assemble.[b]

Such at least is the usually received derivation of the word. It may, however, be suggested, that this derivation by no means precludes the possibility, or perhaps the pro-

[a] Tomline on the Nineteenth Article.

[b] See 2 Burn's E. L. 321, and Rogers's E. L.

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bability, of a primary meaning in our word, such as that of ecclesia, and such as we have used it in this chapter. Κυριακὸς, or belonging to the Lord, is equally applicable to either meaning; and if we take the word οἰκια, or perhaps even δῖκος, in a meaning which would be strictly classical, to signify a household or family, or a fraternity,[c] we have a primary meaning to our word Church, even more appropriate and satisfactory than that of the Latin word ecclesia.

Persons ecclesiastical.

This Church or Christian fraternity has been and is governed, or presided over, by certain ecclesiastical persons of various degrees of authority; and they, together with the whole body, are subject to one supreme head.

Formerly regular and secular.

Previously to the time of the Reformation in this country, these ecclesiastical persons were divided into regular and secular. Regular, because they lived under certain rules, and were professed in some of the orders of religion, and had vowed three things—true obedience, perpetual chastity, and wilful poverty; such as abbots, priors, monks, and others of such orders regular. And secular, such as did not live under any of such orders, and so called for distinction's sake, as bishops, deans and chapters, archdeacons, canons, parsons, vicars, and such like. And Littleton probably alludes to this distinction, when he speaks of men of religion and of holy church.[d] But in the reign of Henry VIII., when the monastic rule of life was abrogated, the regular ecclesiastical persons ceased to be any longer recognized by the laws of the country as a part of the church establishment;[e] with these therefore we have no further care.

Connection of the Church with the State.

The exact position which the Church of England as such occupies with respect to the civil government, and the whole community of the state, is matter of political reasoning and speculation, rather than of law; a subject upon which opinions have been, and probably ever will be, widely different; and upon which it would therefore be unwise to enter at any length in a treatise upon those legal subjects which admit of no doubt nor speculation, but which have been firmly settled and determined.

The subject however of this union, connection, or alliance, between the Church and the State, whichever of the above terms may be deemed most appropriate, is one which directly or indirectly has a strong bearing upon many questions of Ecclesiastical Law. And without noticing the extreme opinions on the one hand, that the Church and her

[c] See the use of this word by Xenophon, Lysias, and Isocrates.
[d] Co. Litt. c. 6, 133. [e] A. D. 1530.

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religion are mere creatures of the State; on the other, that the temporal power is wholly dependant or subordinate; and without hazarding any opinion in a question of so much difficulty, it may be useful to mention the condensed opinions of those who are entitled to most weight on this subject. In a recent work, in which the whole question has been fully considered,[f] the opinion of Hooker, in his Ecclesiastical Polity, is stated to have been, "That the same persons compose the Church and the Commonwealth of England universally; that the same subject is therefore intended under the respective names of the Church and the Commonwealth; and that it is thus variously named only in respect of accidents, or properties and actions, which are different. His opponents, it is said, contended for a personal separation, which precluded the same man from bearing sway in both; he for a natural one, which did not forbid such an union of authorities. He considered that the Church and the Commonwealth are in this therefore personally one society; which society is termed a Commonwealth, as it liveth under whatsoever form of secular law and government; a Church, as it has the spiritual law of Jesus Christ. That in this society, considered as a Church, the king is the highest uncommanded officer: that his chief ecclesiastical powers are in right of his headship: the right of calling or dissolving the greater assemblies; that of assent to all Church ordinances, which are to have the force of law; the advancement of prelates; the highest judicial authority; and in general an exemption from the ordinary church censures to which others are liable. That the conveyance of power is not to each sovereign in succession, but to one originally, from whom the rest inherit; and the body cannot help itself but with consent of the head, while there is one. That the king's judicial power is subject to Church Law; and it is the head of all, simply because not confined to a district, but legally reaching to all. That kings have authority over the Church, if not collectively, yet divisively understood; that is, over each particular person in that Church where there are kings. That the Commonwealth, when the people are Christians, being *ipso facto* the Church, the clergy alone ought not to have the power of making laws. *Quod omnes tangit ab omnibus tractari et approbari debet.*" And the fact is, that canons of the clergy in their synods have generally taken no effect as laws, without the approbation of governors. In this country, as we shall have to observe in speaking of the convocation, the laws made by

Opinion of Bishop Hooker.

[f] Gladstone on Church and State.

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the clergy in their assemblies have no power to bind the laity, unless confirmed by the parliament, in which case, it is the act of the parliament, not of the clergy, which gives them force and validity. "The king's power of assent," he says, "is a power derived to him from the whole body of the realm; the religious duty of kings is the weightiest part of their sovereignty."

Opinion of Bishop Warburton.

The opinions of Bishop Warburton on this subject, are in the same place stated to be, "That civil society, being defective in the control of motives, and in the sanction of reward, has, in all ages, called in the aid of religion to supply the want: the State contemplates for its end the body and its interests; has for its means, coercion; for its general subject-matter, utility. The Church is a religious society of distinct origin; having for its end, the salvation of souls; for its subject-matter, truth; for its instrument, persuasion; regulating motives as well as acts, and promising eternal reward. Though separate, these societies would not interfere, because they have different provinces, but the State having needs as above stated, and the Church wanting protection against violence, they have each reasons sufficient for a voluntary and free convention. Accordingly the societies united, not indeed under any formal engagement, with all the stipulated conditions; but like sovereign and people in the original contract. That is, the theory of the alliance accurately represents the true idea according to which they ought to unite. The conditions of the union are, that the Church receives a free maintenance for the clergy, a share for her security in the legislative body, and a coactive power, to be used in her Spiritual Courts for a purpose, which is also a state purpose, namely, the correction of certain forms of vice. In return for which she surrenders to the State her original independency, and subjects all her laws and movements to the necessity of the State's previous approval. If there be more than one such religious society or church, the State is to contract with the largest, to which will naturally belong the greatest share of political influence."

Opinion of Dr. Paley.

The opinion of Dr. Paley differs somewhat considerably from the foregoing; he says,[s] "that the authority of a church establishment is founded only on its utility. That the single end we ought to propose by it, is the preservation and communication of religious knowledge. That every other end, and every other idea, that have been mixed with this, as the making the Church the engine or even the ally of the state, converting it into the means of

[s] Moral and Political Philosophy, chap. x.

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strengthening or diffusing influence; or regarding it as a support of regal, in opposition to popular, forms of government, have served only to debase the institution, and to introduce into it numerous corruptions and abuses. That the notion of a religious establishment comprehends three things,—a clergy, or an order of men secluded from other professions, to attend upon the offices of religion; a legal provision for the maintenance of the clergy; and the confining of that provision to the teachers of a particular sect of Christianity."

Church establishment as separated from the Church.

From the above opinions of these eminent writers, which we have here selected on account of their diversity, it will be seen that this question is very speculative; and probably, in order to arrive at any tangible view of this question in a legal sense, we must separate the Church Establishment from the general idea of the Church, or consider the persons ecclesiastical as representing the Church of England.

Connection between the Church and State by means of the same chief magistrate.

The connection between the Church and State will then be most obvious, in the fact that the sovereign head of the State is the head also of the Church Establishment, the source from which its superior officers derive their authority, and the ultimate resort in all causes in which the ecclesiastical establishment is concerned. The seats of the bishops in the Upper House, and the votes allowed to the clergy in the electing members of the Lower House of parliament, may be other instances of this connection; but the union of the civil and ecclesiastical polity is chiefly evident in the incidents which arise from the unity of their head.

Did not exist before the Reformation.

Before the Reformation, therefore, when the supremacy of the Pope was acknowledged in all matters ecclesiastical, there was, legally speaking, no union between Church and State in this country; and the evils of such a disunion were apparent in the constant jealousy and quarrels which existed between the civil and ecclesiastical authorities. The clergy in those times seem always carefully to have repudiated any connection with or dependance on the State. Not only was their ecclesiastical jurisdiction entirely independent of the civil,—extending over a great variety of causes,—trespassing upon the province of the laity, and threatening an universal supremacy over all persons and causes; but they claimed, and for a time obtained, an absolute exemption from the justice of the State. Of such matters we shall speak hereafter in treating of the former privileges of the clergy[h]. At present we only notice them to remark, that when such a state of things

[h] Vide post, Chap. VI.

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existed, it would be obviously impossible to consider that there was any real connection or alliance between the civil and the ecclesiastical polity.

Establishment of the king's supremacy in ecclesiastical matters.

This alliance, therefore, may be said to have commenced in the 22d year of the reign of Henry VIII.; in which year, when the whole clergy of this realm were supposed to have incurred the penalties of a *præmunire*, they implored the clemency of the king, and petitioned in convocation for a remission of those penalties; and in their petition, the king was, for the first time, styled the protector and supreme head of the Church and clergy of England. The words, as Gibson has given them, being—"Ecclesiæ et cleri Anglicani cujus singularem protectorem unicum et supremum dominum, et quantum per Christi legem licet etiam supremum caput ipsius majestatem recognoscimus[i]." This, therefore, it will be observed, passed with the important qualification "so far as is permitted by the law of Christ." And in an act of parliament passed shortly afterwards, reciting that the king's majesty justly and rightfully is, and ought to be, the supreme head of the Church of England, and so had been recognised by the clergy of this kingdom in their convocation, it is enacted, that the king shall be reputed the only supreme head in earth of the Church of England, and shall have annexed to the imperial crown of this realm as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of supreme head of the Church appertaining.[k] And after this declaration of the law, those who denied the supremacy of the king subjected themselves to capital punishment. This act, however, was repealed in the first year of the reign of Mary[l], and the supremacy of the Pope over the Church of these realms was once more established by law. But by one of the first acts of the parliament which met soon after the accession of Elizabeth, the supremacy in ecclesiastical affairs was restored to the crown; and from that time continuously to the present, the sovereign of these realms has been alike the head of the State and of the Church of England,—supreme over all persons and all causes ecclesiastical as well as civil; and to deny such supremacy, or to assert the supremacy of the Pope, are offences which are severely punishable by our law[m].

In this character of supreme governor and head of the Established Church in this country, the sovereign may be considered as a person ecclesiastical; but he is not subject to, or affected by, any of those restrictions, which we shall

[i] Gibs. 23. [k] 26 Hen. 8, c. 1. [l] Mar. sess. 1, c. 1.
[m] See 1 Edw. 6, c. 12; 1 Eliz. c. 1, ss. 27, 30; 5 Eliz. c. 1, s. 2.

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hereafter have to mention, as affixed to ecclesiastical persons generally.

His prerogatives as such head.

In virtue of his authority as supreme head of the Church, the sovereign convenes, prorogues, restrains, regulates and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown, long before the time of Hen. VIII., as appears by the statutes 8 Hen. VI. c. 1, and the many others, both lawyers and historians, vouched by Sir Edward Coke; and would be, besides, sufficiently evident from the nature and origin of the convocation; so that the statute 25 Hen. VIII. c. 19, which restrains the convocation from making or putting in execution any canons repugnant to the king's prerogative, or the laws, customs and statutes of the realm, was merely declaratory of the old common law; that part of it only being new, which makes the king's royal assent actually necessary to the validity of every canon[n].

In the convocation.

Appointment of bishops, &c.

From this prerogative also, of being the head of the Church, arises the king's right of nomination to vacant bishopricks, and certain other ecclesiastical preferments, which will more properly be considered when we come to treat of the different ranks of persons ecclesiastical.

Appeal to king in privy council.

As the head of the Church, the king is likewise the dernier resort in all ecclesiastical causes; an appeal lying ultimately to him from the sentence of every ecclesiastical judge; which right was restored to the crown by statute 25 Hen. VIII. c. 19[o]. This appeal to the sovereign in ecclesiastical causes now lies to the judicial committee of his privy council, or, as it is legally expressed, to the sovereign in council; of which court, and its jurisdiction, we shall speak in considering the government and discipline of the ecclesiastical body[p].

Church of Ireland.

In all matters of doctrine, worship, discipline and government, the Church of Ireland is governed by the same laws as the Church of England; and the Churches of England and of Ireland are, since the union of these countries, united into one Protestant Episcopal Church, called the United Church of England and Ireland; and the continuance of this Church of Ireland is to be deemed an essential part of the Union[q]. All matters, therefore, which are treated of in the present volume, unless where any exception is particularly specified, relate equally to the United Church of England and of Ireland.

[n] 1 Black. Com. 279. [o] Ibid. [p] See post, Ch. IV.
[q] 39 & 40 Geo. 3, c. 67, art. 5.

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CHAPTER II.

OF ORDINATION.

Persons ecclesiastical a seperate order in the state.

In speaking of persons ecclesiastical, the first point for our consideration will be, the manner in which they are, as it were, set apart from the rest of their fellow citizens, made a separate order in the state, and qualified to discharge the duties of their holy office.

How separated.

The Apostles having appointed certain persons to be the standing governors and preachers of the Christian Church, it has been thought necessary that there should be a power lodged somewhere to set apart some distinct orders of men for the exercise of those public offices; and this is by the ceremony of ordination; a rite of a character so sacred, that in the Roman Catholic Church it is accounted a sacrament, as an outward visible sign of an inward spiritual grace conferred. And in that Church there were several orders to which a man might be ordained; which distinctions are not admitted in the Church of England; but the only orders in our Church, as declared by different statutes, are those of bishops, priests, and deacons.[a]

Different kinds of orders.

Bishops.

With respect to the ordering of bishops we shall speak more particularly hereafter; for as every bishop, prior to his ordination, is already an ecclesiastical person, the subject is foreign to our present purpose.

Priests and deacons.

The word priest is in all Christian languages nearly the same; all evidently taken from the Greek πρεσβυτερος; and in like manner the word deacon, with little variation, is to be found in all the same languages, and is deduced from the Greek διακονος.

Canonical impediments to orders.

It does not appear necessary here to consider the various canonical impediments which formerly existed to the taking of orders; they were expressed with a somewhat minute particularity; but all such as could be considered reasonable are sufficiently included and embodied in the preface to the form of ordaining deacons, which gives these simple directions only.

Qualification of a deacon as to morality.

The bishop knowing by himself, or by sufficient testi-

[a] 3 Edw. 6; 5 & 6 Edw. 6; 13 & 14 Car. 2; Gibs. Cod. 115.

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mony, any man to be of virtuous conversation, and without crime, and, after examination and trial, finding him learned in the Latin tongue, and sufficiently instructed in Holy Scripture, may admit him a deacon.[b]

Of a priest.

And, with respect to priest's orders, it is directed by the statute 13 Eliz. c. 12, that none shall be made minister (which is to be considered here as synonymous with the word priest), unless it appear to the bishop that he is of honest life, and professeth the doctrine expressed in the Thirty-nine Articles, nor unless he is able to answer and render to the ordinary an account of his faith in Latin according to the said articles, or have special gift or ability to be a preacher.

Bishop the sole judge of the moral conduct of the candidate.

The above requisites therefore being observed, the others are not now necessary; and with regard to the moral and personal qualifications of the candidate, it appears that the bishop in his discretion is the sole and proper judge, unfettered in the exercise of his judgment by any particular tests which might formerly have been imposed.

Testimonials of conduct.

And, as a guide to the bishop in the exercise of his discretionary power, it is declared that the candidate shall then exhibit letters of testimonial of his good life and conversation under the seal of some college of Oxford or Cambridge, where before he remained, or of three or four grave ministers, together with the subscription and testimony of other credible persons, who have known his life and behaviour for three years next before;[c] which regulation applies to priests and deacons equally. And if the candidate has quitted college, and has been residing elsewhere, a notice, usually termed a "*Si quis*," must be published in the church of the parish where the candidate has usually resided, the object of which will be best understood by the form thereof given in the appendix;[d] and a certificate that such has been properly published must be sent with the testimonials to the bishop.

There are other qualifications, however, besides those of moral conduct, the observance of which is indispensable.

Qualification in respect of age.

No bishop shall admit any person into holy orders unless he, desiring to be a deacon, is three-and-twenty years old, and to be a priest, four-and-twenty years complete; and as to priest's orders, the canon is affirmed in that respect by statute,[e] and it being consequently a part of the statute law of the realm that none shall be admitted priest (or minister), being under the age of four-and-twenty years,

[b] Preface to form of ordaining deacon.
[c] Canon. 34. See forms of testimonials in Appendix.
[d] See App. No. I. [e] 13 Eliz. c. 12.

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there can be no dispensation; but with regard to deacon's orders, the regulation being by the canon law only, the qualification of age might possibly be dispensed with; and by virtue of a faculty or dispensation from the Archbishop of Canterbury, allowed sometimes to persons of extraordinary abilities, a person might be admitted to deacon's orders sooner.[f] And so essential is this qualification of proper age considered, that it is declared by statute, that in case any person shall, from and after the passing of that act (1804), be admitted a deacon before he shall have attained the age of three-and-twenty years complete, or admitted a priest before he shall have attained the age of four-and-twenty years complete, in every such case, the admission of every such person as deacon, or priest, respectively, shall be void in law, as if such admission had not been made; and the person so admitted shall be wholly incapable of having, holding, or enjoying, or being admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion, or dignity whatsoever, in virtue of such his admission as deacon or priest respectively, or of any qualification derived or supposed to be derived therefrom: provided that no title to confer or present by lapse shall accrue by any avoidance or deprivation *ipso facto* by virtue of this statute, but after six months' notice of such avoidance or deprivation given by the ordinary to the patron.[g]

Ordination of persons under the proper age is void.

As to lapse in consequence of such void ordination.

Previously to the time of passing this statute, where a person, who had been presented to a parish church, was libelled against in the spiritual court as not having been properly qualified in age at the time of his ordination, a prohibition was prayed, on the suggestion that if the matter was true, a temporal loss, viz. deprivation, would follow, and that it was therefore triable in the temporal court; but the prohibition was refused;[h] and should such a case now arise, although, in consequence of the statute, the only possible matter to be tried would be the fact of the right age of the party, it seems that the spiritual court would still be proper for that purpose.

Where such a question would be triable.

The next indispensable qualification is, that the candidate to be admitted into holy orders should have some certain place where he may use his function; and this is called his title to orders,—without which, if any bishop shall admit any person into the ministry, then he shall keep and maintain him with all things necessary till he do prefer him unto some ecclesiastical living: and if the said bishop shall refuse so to do, he shall be suspended by the

Qualification in respect of title.

[f] See 44 Geo. 3, c. 43; and Rogers's E. L. 602.
[g] 44 Geo. 3, c. 43. [h] E. 1 Jac. 2; *Roberts* v. *Pain*.

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archbishop, assisted by another bishop, from giving of orders for the space of a year.[i]

Such titles to orders may be had of the seven following different kinds.

Different kinds of titles.

The party desirous of being ordained must, at that time, exhibit to the bishop of whom he desireth imposition of hands, a presentation to himself to some ecclesiastical preferment, then void, in the diocese; or he must bring to the said bishop a certificate, that either he is provided of some church within the said diocese where he may attend the cure of souls, or of some minister's place vacant either in the cathedral church of that diocese, or in some other collegiate church therein also situate, wherein he may execute his ministry; or he must bring a certificate that he is a fellow or in right as a fellow; or that he is to be a conduct or chaplain in some college in Cambridge or Oxford; except by the bishop himself that doth ordain him minister he be shortly after to be admitted either to some benefice or curateship then void.[k] And another title to orders is mentioned in the 33d canon together with these; namely, that of being a Master of Arts of five years' standing that liveth of his own charge in either of the universities. But such is not now considered as a sufficient title; nor would it be allowed as such by any bishop, according to the opinion of those best qualified to form a judgment on the subject.[l]

Some of these appear to have been considered as good titles to orders before the time of the canon, while others appear to have been established or extended by the canon.

Bishop, giving letters dimissory, is to see that there is a good title.

In cases where letters dimissory (to be afterwards spoken of) are given, it is the business of the bishop giving them, not of him to whom they are sent, and by whom the candidate is actually ordained, to see that there is a good title; and he shall consequently be liable to the penalty, if there should be no good title.[m]

Qualification in respect of learning.

The next qualification necessary for the taking of holy orders is one which must necessarily depend in a great measure on the discretion and judgment of the bishop; viz. that the candidate shall be sufficiently learned in literature, and in the knowledge of the Holy Scriptures, and in the religious doctrine of the Church; for no bishop shall admit any person into sacred orders except he hath taken some degree of school in either of the two universities; or,

[i] Canon 33.
[k] Ibid.
[l] Communicated to the author as the present practice of the bishops.
[m] Rogers's E L. 604; Gib. s. 144.

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at the least, except he be able to yield an account of his faith in Latin, according to the 39 Articles.[n] And, by the statute of Elizabeth before quoted, none shall be made minister [priest] unless it appear to the bishop that he is of honest life, and professeth the doctrine expressed in the 39 Articles; nor unless he be able to answer and render to the ordinary an account of his faith in Latin, according to the said articles, or have special gift or ability to be a preacher.

Examination.

And in order to ascertain whether the candidate for holy orders has this last-mentioned qualification, the bishop, before he admit any person into holy orders, shall diligently examine him in the presence of those ministers that assist him at the imposition of hands;[o] and if the bishop have any lawful impediment, he shall cause the said ministers carefully to examine every such person so to be ordained; and if any bishop or suffragan shall admit any to sacred orders who is not so examined and qualified, the archbishop of his province, having notice thereof, and being assisted therein by one bishop, shall suspend the said bishop or suffragan, so offending, from making either deacons or priests for the space of two years.[p]

Archdeacon the proper person to examine.

Which examination, according to Lindwood, pertaineth of common right to the archdeacon, and in the canon law it is laid down as one branch of the archidiaconal office; and this is also supposed to be the case in our form of ordination, both of priests and deacons, where the archdeacon's office is to present the persons that are apt and meet.[q]

But there appears to be no reason deducible from convenience, or otherwise, why the common law right should not remain the same, and the injunctions of the canon be obeyed; for the archdeacon, who, from his dignity, should always be fitted for the performance of such a duty, might well be appointed the examining chaplain to the bishop; and in fact this practice has latterly begun to prevail in the best ordered dioceses of this country.

Oaths and subscription necessary before ordination.

The next indispensable qualification for holy orders is, that the candidate, before he receive or take any such orders, shall take the oaths of allegiance and supremacy before the ordinary or commissary; nor can he be admitted to the office of deacon or minister, unless he shall first subscribe to all the articles of religion agreed upon in convocation in the year 1562, which alone contain the confession of the true Christian faith, and the doctrine of

[n] Canon 34.
[o] Canon 35.
[p] Canon 34.
[q] 3 Burn's E. L., Ordination.

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the sacraments; and he must further subscribe to the following articles:[r]

First. That the king's majesty, under God, is the only supreme governor of this realm and of all other his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes as temporal: and that no foreign prince, person, prelate, state, or potentate, hath, or ought to have, any jurisdiction, power, superiority, preeminence, or authority, ecclesiastical or spiritual, within his majesty's said realm, dominions and countries. King's supremacy.

Second. That the book of Common Prayer, and of ordering of bishops, priests and deacons, containeth in it nothing contrary to the word of God, and that it may lawfully so be used, and that he himself will use the form in the said book prescribed, in public prayer and administration of the sacraments, and none other. Book of Common Prayer.

Third. That he alloweth the book of articles of religion agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation at London, in the year of our Lord God 1562, and that he acknowledgeth all and every the articles therein contained, being in number nine-and-thirty besides the ratification, to be agreeable to the word of God. Which subscription, as it seemeth by the same and following canon, must be before the bishop himself. And for the avoiding all ambiguities, such person shall subscribe in this form and order of words, setting down both his Christian and surname, viz. I, N. N., do willingly, and *ex animo*, subscribe to these three articles above mentioned, and to all things that are contained in them. Thirty-nine Articles.

Of these several qualifications before mentioned, it will be observed that some are fixed in their nature and indispensably necessary; that others depend in a great measure upon the discretion and judgment of the bishop. But it does not necessarily follow that a person, having all these qualifications, could demand as right that he be ordained; for it is after all discretionary in the bishop whom he will admit to the order of priest or deacon, and he is not obliged to give any reason for his refusal. For by the statute, rubric, and canon, he is not required, but permitted to admit persons having such qualifications as we have mentioned, and prohibited from admitting any who have them not; but he is not enjoined to admit any persons although they have these qualifications. Consequently if a bishop should refuse to ordain, or to give his reasons for such refusal, or if he should give them and they should appear The conferring of orders is discretionary.

[r] 1 Eliz. c. 1; 1 Will. 3, c. 8; 13 Eliz. c. 12; Can. 36.

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to be insufficient, it does not appear that the rejected candidate would have any remedy.

Candidates must be ordained in the diocese where their title is.

A candidate for holy orders, being qualified as we have here mentioned, and approved of by the bishop, is to be ordained by the bishop of his own diocese; that is, of the diocese where his title, or place where he may use his function, happens to be. And no person shall admit any person into sacred orders which is not of his own diocese, except he be either of one of the universities of this realm, or except he shall bring letters dimissory from the bishop of whose diocese he is.[s]

Fellows of colleges ordained by the bishop of the diocese where their college is situated.

With respect to the first of these exceptions, the being of one of the universities, means the being a fellow, or in right as a fellow, of some college, on which title he may be ordained; but this exception is permitted, not commanded, by the canon; and in the ancient acts of ordination, the fellows of New College, Oxford; Saint Mary Winton, and King's College, Cambridge, and no others, are mentioned as possessed of a special privilege from the pope to be ordained by what bishops they pleased; and they are said to be *sufficienter dimissi*, in virtue of that privilege, and without letters dimissory; but it does not appear that at that time the fellows of any other college were possessed of a similar privilege, and now, in practice, there is no exception to the general rule in this respect, either as to the fellows of the particular colleges above mentioned, or of any other; but as all ordination is discretionary in the bishops as to whom they will ordain or not, it appears to be a rule by them established, and consequently of full force, that the title of a fellow of a college in one of the universities shall be a title only in that diocese in which the university is situated, so that fellows in the University of Oxford are ordained by virtue of that title by the Bishop of Oxford only; and those in the University of Cambridge, in like manner, by the Bishop of Ely.[t] A return to the ancient practice, for which there obviously exist many and well founded reasons. Nevertheless, it appears that a bishop of any other diocese, who might choose to make an exception in this matter, might do so, without incurring any of the penalties before mentioned for ordaining a person without a title: and probably even now there may be individual cases which, for special reasons, are made exceptions.

Letters dimissory.

The other exception to the rule above mentioned, viz.

[s] Canon 34.

[t] Communicated to the author as the present practice of the bishops.

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the case of letters dimissory from another bishop, is an exception apparent rather than real: for these letters dimissory are nothing more than a license from the bishop of the diocese, where the candidate has his title, by virtue of which license the candidate to whom it is granted may be ordained by the bishop to whom it is sent: and in such a case the bishop granting the letters dimissory must take care that the candidate has every proper qualification as to age, morals, acquirements, &c., and that he has the qualification of title within his diocese, and he would be liable to the penalties imposed in each case if the candidate were ordained improperly, and without these qualifications.

Duty of bishop granting them.

The bishop therefore, to whom the letters dimissory are directed, has merely to perform the ministerial act of ordination; for doing which he is not responsible, if any qualification should be found to have been wanting; for he is to presume that the persons recommended to him are fit and sufficient.

During the vacancy of any see, the right of granting letters dimissory within that see rests in the guardian of the spiritualties; and, in consequence, the right of ordaining also, where such guardian is of the episcopal order; and if a bishop be in parts remote, it seems that his vicar-general may grant letters dimissory, and those who enjoy jurisdictions entirely exempt from the bishop.[u]

Who to grant during a vacancy of the see.

In certain other cases.

Where a spiritual corporation, aggregate or sole, exercises peculiar jurisdiction, a candidate for ordination on a title within such jurisdiction receives a letter dimissory from such corporation to the bishop of the diocese, where the cure giving such title is locally situate. But where the peculiar is subject to any other jurisdiction than that of such a corporation, the candidate for ordination, or the person possessing such jurisdiction, prefers his petition to the local bishop to ordain, who, on being satisfied with the title, &c. consents to do so.[x]

But archdeacons and officials cannot grant letters dimissory, neither can the archbishop as metropolitan; but, at the time of his metropolitan visitation of any diocese, he may grant letters dimissory, and also ordain the clergy of the diocese visited.[y]

Archdeacons and officials may not grant.

If any bishop shall ordain a person of another diocese without the special license of the bishop of that diocese, he shall be suspended from ordaining any person to that order which he shall have so conferred, until he have

Bishop ordaining candidate from another diocese without license.

[u] Gibs. Cod. 164; Ayl. Parer. 482.
[x] Communicated to the author as being the usual practice.
[y] Gibs. Cod. 164; Ayl. Parer. 482.

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made a proper satisfaction. And the person so ordained by him shall be suspended from the exercise of such order until he obtains a dispensation from his own bishop, that is, the bishop by whom he ought to have been ordained, who may ratify such ordination; and of such dispensations there are to be found many instances in our ecclesiastical records.[z]

Foreigners may be ordained by English bishops.

In speaking of these several preliminary qualifications, which are to be observed previously to the setting apart of any person for the discharge of the sacred office, it may be well to mention that such remarks are intended to apply only to such as are to become persons ecclesiastical, and to exercise their holy office within this realm; for by the statute of 24 Geo. III. c. 35, after reciting that divers subjects of foreign countries are desirous that the Word of God and the sacraments are to be administered to them according to the Liturgy of the Church of England by subjects of the said countries, ordained according to the form of ordination in the Church of England, the Bishop of London, or any other bishop to be by him appointed, is empowered to admit to the order of deacon or priest, for the purposes aforesaid, persons, subjects, or citizens out of his majesty's dominions, without requiring them to take the oath of allegiance; but such persons so ordained cannot exercise their office within his majesty's dominions.

Persons ordained for the colonies.

And by statute 59 Geo. III. c. 60,[a] the archbishops of this realm, or the Bishop of London, or any bishop authorised by any or either of them, may admit to the holy orders of deacon, or priest, any person whom, on examination, he shall find duly qualified specially for the purpose of taking on himself the cure of souls, or officiating in any spiritual capacity in his majesty's colonies, or foreign possessions, and residing therein; and a declaration of or written engagement to perform such purpose, under the hand of such person, being deposited in the hands of such archbishop or bishop, shall be held a sufficient title with a view to such ordination; and it shall be distinctly stated in his letters of ordination that he has been ordained for cure of souls in his majesty's foreign possessions.

Restrictions on persons ordained for the colonies from officiating in England.

No person admitted into holy orders for these purposes shall be capable of holding, or being admitted to, any benefice, or other ecclesiastical dignity soever, within the United Kingdom, or of acting as curate therein, without the previous consent and approbation in writing under the hand and seal of the bishop of the diocese in which any

[z] Gibs. 142. [a] Sect. 1.

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such benefice, &c., is locally situate, nor without like consent of such one of the said archbishops or bishop of London, by whom, or by whose authority he has been originally ordained, or in case of the demise or translation of such archbishop or bishop, of his successor in the same see; provided that no such consent, &c. shall be given, unless the applicant first produces a testimonial of his good behaviour during his residence abroad from the bishop in whose diocese he has officiated; or if no such bishop, from the governor in council of the colony in which he may have been resident, or from the colonial secretary of state.

And on those ordained by colonial bishops.

No person admitted into holy orders by Bishops of Quebec, Nova Scotia, or Calcutta, or by any other bishop or archbishop than those of England or Ireland, shall be capable of officiating in any church or chapel of England or Ireland without special permission from the archbishop of the province where he proposes to officiate, or of holding or being admitted to any ecclesiastical preferment in England or Ireland, or acting as curate therein, without the consent and approbation of the archbishop and of the bishop of the diocese, wherein any such preferment or curacy is situate.

No person, after 2d July, 1819, ordained deacon or priest by a colonial bishop, who, at the time of such ordination, did not actually possess episcopal jurisdiction over some diocese, district, or place, or was not actually resident therein, shall be capable of at any time holding preferment within his majesty's dominions, or of being stipendiary curate or chaplain, or officiating in any place or manner as a minister of the Established Church of England and Ireland. And all admissions, inductions, and appointments to curacies made contrary to this act shall be void.

The restrictions under which persons thus ordained are placed show how essentially necessary the qualifications for ordination before mentioned are considered for ministers of the Established Church in this country.

Time of ordination.

It appears that so early as the fourth or fifth century, the *Jejunia quatuor temporum*, or the Ember-weeks, became the fixed period for ordination. And these are understood to be the certain seasons alluded to by the canons of Lanfranc, at which it was there enjoined that ordination should be performed. And by statute[b] the bishop may admit to the order of priest or deacon at the times appointed by the canon, or else upon some urgent occasion, upon some other Sunday or holiday, in the face

[b] 3 & 4 Edw. 6; 13 & 14 Car. 2.

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of the church. Gibson says that the practice has been for the bishop to have the archbishop's dispensation for departing from the canon. Formerly, he says, it was a special prerogative of the see of Rome; and the upper house of convocation in Mary's reign resolved that the bishops should be authorised by the pope to give orders *extra quatuor tempora*.[c] At the present day, ordinations are generally on the Sundays next following the Ember-weeks; but orders are frequently conferred at other times also; and it does not appear now to be the practice to obtain a dispensation from the archbishop for so doing.

Form of ordination.

It does not appear to be useful here to speak in detail of the form or manner of ordaining priests and deacons, which is to be found in many of our books of Common Prayer.

It is directed by the thirty-first canon that the giving of orders should be in the cathedral or parish church where the bishop resides. So that, as Dr. Burn observes, the bishop's jurisdiction as to conferring of orders is not confined to one certain place, but he may ordain at the parish church where he shall reside.[d] But in practice even the parish church does not seem to be considered essentially necessary, in the case of a bishop ordaining out of his cathedral church or out of his diocese; for a late Bishop of Hereford, who was also warden of Winchester College, and consequently resided at the latter place, was in the habit of conferring orders within the chapel belonging to the college. Nor does there appear to be any legal or valid objection to such a course; but regularly, it is said, leave ought to be obtained of the bishop within whose diocese the ordination is performed;[e] which, as Gibson says,[f] is agreeable to the rule of the ancient canon law, which directs that a bishop shall not ordain within the diocese of another without his consent. But it does not appear that the bishop so conferring orders incurs any penalty, though he should ordain without such consent.

Fees for.

No fee or money shall be received either by the archbishop or any bishop or surrogate, either directly or indirectly, for admitting any person into sacred orders; nor shall any other person or persons under the said archbishop, bishop, or suffragan, for parchment, writing, wax, sealing, or any other respect thereto appertaing, take above 10*s*., under such pains as are already by law prescribed.[g]

Every parson, vicar and curate is required to show his

[c] Godolph. Abr. App. 19; and see Rogers's E. L. 606.
[d] Johns. 34; 3 Burn's E. L. 28.
[e] Johns. 34. [f] Gibs. 139. [g] Canon 35.

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letters of orders to the bishop at his first visitation, or at the first visitation after his admission, to be allowed or disallowed, and, if approved, to be signed by the registrar; the whole fees to be paid but once in the whole time of every bishop, and afterwards but half the fees.[h]

Simoniacal ordinations.

Blackstone, in more than one place, observes[i] that the obtaining orders, or a license to preach, by money or any corrupt practice is the true, though not the common, notion of simony; and certainly the sin of Simon Magus, from which the name is generally considered to be derived, is much nearer allied to this kind of simony than to any other.

Early mention of, and forbidden by the canon law.

And in the earliest mention of simony in the ecclesiastical constitutions of this country, at a council held at Winchester in 1070, there are two heads, of which the second is, "of ordaining men promiscuously, and by means of money." And in Lanfranc's Canons in the same year, it is ordered that no one be ordained by simoniacal heresy. In Corboyl's Canons, in 1126 and 1127, it is said to be forbidden by the apostolical see that any should be ordained or preferred by means of money.

And by Canon 35 it is ordered, that no fee or money shall be received, either by the archbishop, or any bishop, or surrogate, either directly or indirectly, for admitting any person into sacred orders; nor shall any other person or persons under the said archbishop, bishop, or suffragan, for parchment, writing, wax, sealing, or any other respect thereto appertaining, take above 10*s*., under such pains as are already by law prescribed.

Thus we see that, from an early period, this kind of simony was known to and forbidden by the laws of the Church; but whether, notwithstanding the prohibition, the crime continued as open and notorious as that of the simony more commonly so termed (the corrupt presentation to benefices for gift or reward), we have no authority for determining.

Forbidden by statute.

By the statute 31 Eliz. c. 6, for the prevention and punishment of simony generally, this kind of simony is provided against; and it is enacted that if any person shall receive or take any money, fee, or reward, or any other profit, directly or indirectly, or shall take any promise, agreement, covenant, bond, or other assurance, to receive or have any money, fee, reward, or any other profits, directly or indirectly, either to himself or to any other of his friends (all ordinary and lawful fees only excepted), for or

[h] Canon 137.

[i] 1 Comm. 388; 2 Comm. 275; 4 Comm. 62.

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to procure the ordaining or making of any minister, or giving of any orders or license to preach, he shall for every such offence forfeit the sum of 40*l.*; and the party so corruptly ordained or made minister, or taking orders, shall forfeit the sum of 10*l.* And if at any time within seven years next after such corrupt entering into the ministry, or receiving of orders, he shall accept or take any benefice, living, or promotion ecclesiastical, then immediately from and after the induction, investing, or installation thereof or thereunto had, the same shall be eftsoons merely void; and the patron shall present, collate unto, give and dispose of the same, as if the party so inducted, invested, or installed, had been naturally dead.[k]

Corrupt bargaining for orders.

As to what might be considered a corrupt bargaining for taking orders, the opinion of Lord Eldon in the following case appears important; and it appears to be immaterial that the case was decided on other grounds than those to which Lord Eldon alludes; for his observations on the subject are general, and involve a principle upon which the decision of that particular case would not have thrown much light.

The late Lord Kircudbright, by his bond, dated the 1st of October, 1793, bound himself to his eldest son, the present lord, in the penal sum of 300*l.*, with a condition to be void, if Lord Kircudbright, the father, his heirs, executors, &c. should pay to his said son an annuity of 100*l.*, until his said son should be instituted and placed in the possession of a living in the Church of England; and from such time, if the said John Lord Kircudbright, his heirs, executors, &c., should pay to his said son, his executors, &c., so much money as, with the net income of such living, should produce the clear yearly sum of 150*l.*, to commence on the day on which he should be inducted into such living, and continue until he should be in the actual possession and enjoyment of a living, which should produce the clear annual sum of 160*l.*

By an agreement in writing between the same parties, and of the same date, reciting the bond, and that previous to the late Lord Kircudbright's entering into such bond, it was agreed that his said son should enter into holy orders, and should accept a living in the Church of England, conformable to the said bond, as soon as the same could be procured for him, the present Lord Kircudbright in consequence thereof did thereby declare and agree that he would forthwith enter into holy orders, and would accept and take to such living as might be procured for him, as

[k] Sect. 10.

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soon as the same could be gotten; and that, in case he should at any time decline or refuse so to do, the said recited bond should be of no avail.

The Lord Chancellor[1] expressed great doubt as to the validity of the bond of the late Lord Kircudbright, observing, that it was void on a great many accounts. It is a corrupt agreement for taking holy orders, such as the court ought to decree to be delivered up. The policy of the ecclesiastical constitution of this country requires that a man should take orders without any reference whatsoever to considerations of this nature. There is no objection to the bond itself, except as connected with this agreement at the same time for a pecuniary consideration to take holy orders. Another objection to this bond is, that the father is put under these circumstances; that he is to solicit the benefit of patronage for this pecuniary consideration moving from himself, the policy of the law supposing the patron to look out for persons the best that can be recommended to him, which excludes pecuniary consideration.

The case stood over in order that this point might be considered; and on a subsequent day the Lord Chancellor said: "This case raises a very considerable and important question to the purity of the Church Establishment, whether, the principles of it requiring from the candidates for holy orders that they should pledge themselves solemnly as to the motives inducing them to enter into that profession, and considering the purity of their motives as one principal test of their sufficiency, if this had been an instrument between strangers, the court would support it; involving this question, whether one party might not have come here, stating that he was willing to take orders, provided this fund was set apart; and whether he could call upon the court to set apart a portion of the assets, and decree him to take orders. The next consideration is, whether, if there would be any objection to this transaction in the case of strangers, it may not prevail between father and son. It is not necessary in this case to decide either of those questions; but I should be very unwilling to part with this subject, without saying that, however familiar it may be, that this transaction is right, I desire it not to be understood that any court of justice has acceded to that opinion. I should have been very unwilling to put these parties to the expense of arguing the point in a court of law, and would rather have taken the short mode of speaking to some of the judges upon it. Last night I mentioned

[1] Lord Eldon.

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it to one of the chief justices, who told me his mind was impressed with the same doubt upon this subject as mine. If the attention of people was called to this, the difficulty would not be felt. But circumstances, that are very ill reconciled to what is required upon the resignation and acceptance of livings, and the absence of all contract by ecclesiastical men upon those subjects, happen with a frequency making them so familiar, that men, who, if well informed, would be the last to act incorrectly, will do so, unless they take the trouble to inquire whether such practices are reconcilable either to law or to our ecclesiastical constitution."[m]

Notice necessary before ordination.

A party, who intends to become a candidate for orders, must give a written notice of such his intention to the bishop, by whom he seeks to be ordained. But as to the time at which this notice is to be given, no positive rule can be laid down. It is a matter entirely within the discretion of the bishop; and, consequently, varying in different dioceses—one year, six months, or three months, are the different periods usually required. This notice should state the age, college, academical degree, and usual place of residence of the candidate, together with the names of any persons of respectability to whom he is best known, and to whom the bishop may apply, if he thinks fit, for any further information concerning him.[n]

CHAPTER III.

OF THE CONVOCATION.

Clergy a distinct order in the state.

CERTAIN persons, qualified in such manner as we have mentioned in our last chapter, having been thus by ordination set apart from the rest of their countrymen, may, for most purposes, be considered as constituting a separate order in the state; having, in many respects, a polity peculiar to themselves, and containing various gradations of rank, from one supreme head and governor, down to the large body of parochial clergy and stipendiary curates[a].

Their councils and assemblies.

Of these various ranks and dignities, of their power and authority, and of the manner in which they are de-

[m] *Lord Kircudbright* v. *Lady Kircudbright*, 3 Ves. 51.

[n] The different forms and testimonials, &c. with which the candidate for ordination must be provided will be found in the Appendix, No. I.

[a] See Black. Com. book 1, chap. 2.

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pendent upon, and subservient or subordinate to, one another, we shall proceed to speak in their order; but first, we speak of their existence as a recognised separate body in the state, in those representative councils in which formerly they often were, and in which they still may be, convoked, and of their power, privileges and authority when there assembled.

Such assemblies are called the Convocation, custom having specially determined the sense of that word to an ecclesiastical use. Convocation.

At a very early period in our annals, and so far back as we have any authentic account of the great councils of the realm or parliament, the bishop and some of our other prelates were consulted, and acted in them together with the laity. In which parliaments it is probable that the opinions of these ecclesiastics was of great weight, as being the only persons of any learning, who in those days of ignorance met to make laws and regulations; and, independently of these parliaments, the archbishop of each province, when the kingdom was divided into provinces, had the power of calling together his suffragan bishops, and these bishops again, each in his own diocese, had the power of calling together their clergy. Ancient councils of ecclesiastics.

After the Norman conquest, the prelates and superior clergy were taxed in respect of their baronies, but the body of the clergy were exempt from the charges assessed upon the laity; and it was only when the pope laid a tax upon the Church for the use of the king, that the clergy, obliged to yield to this union of the spiritual and temporal power, contributed to the public revenues; and sometimes the bishop of the diocese, being prevailed upon by the king, held a meeting of his clergy, in which they consented to grant subsidies in the way of a benevolence. But Edward I., desirous of a more certain method of obtaining supplies, remodelled the whole form of representation; and it was a part of his scheme, that, for the purposes of taxation, the spiritual and the temporal estates should be charged separately, though in the same manner, namely, by the consent of the representative body; and hence the origin of the convocation, the inferior clergy being called together by their representatives, in order that they might tax themselves. Taxation of the clergy the origin of the convocation.

The bishops, who were already convoked in respect of their baronies in the temporal parliament, were, as a part of this scheme, to sit with the assembled clergy. The convocation, therefore, in its origin, was for the purpose of taxation and no other; it was altogether unlike the Convocation unlike the foreign synods.

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convocation of the foreign synods, which were composed solely of the bishops, collected to declare what was the doctrine, or what should be the discipline of the Church[b].

Gradual assumption of authority.

It is easy, however, to conceive how the clergy, when once convoked, gradually assumed the same power as existed in those foreign synods to which their convocation might appear to bear some analogy. Accordingly, that their power might not be made to depend on temporal authority, they objected to meet, except by a summons from the archbishop of their province, who summoned them in pursuance of the king's writ; and in order that the summons might not appear to be solely in pursuance of the king's writ, the archbishop, it is said, for the most part, varied in his summons from the king's writ, both as to the time and place of the meeting. And still, lest it might appear that their power was derived from temporal authority, they sometimes, in assertion of their privilege, met on the summons of the archbishop, without the king's writ: the validity of which convocations the king acknowledged by demanding his supplies. So that the king's writ came to be considered by the clergy as no more than one motive for their convening: but as the authority of the archbishop extended only over his own province, a consequence followed necessarily which was never contemplated in the origin of the convocation; for, instead of forming one, they now composed two ecclesiastical synods under the summons of each of the archbishops; and thus they sat separately, and made canons by which each respective province was bound.

Two convocations.

Power of convocation limited by stat. 25 Hen. 8.

But the power of the convocation, whatever it may at any former time have been, as to which it is not always easy to reconcile the authorities, was restricted, or perhaps, more properly speaking, defined, by a statute which has been called the Act of Submission, passed in the 25th year of Hen. VIII. For Lord Coke, speaking of a part of this enactment, says[c], it was but an affirmance of what was before the statute; for it was held before, that if a canon be against the law of the land, the bishop ought to obey the commandment of the king according to the law of the land. That enactment is as follows:—

The Act of Submission.

Whereas the king's humble and obedient subjects, the clergy of this realm of England, have not only acknowledged, according to the truth, that the convocation of the same clergy is, always hath been, and ought to be, assembled only by the king's writ; but also, submitting themselves to the king's majesty, have promised *in verbo*

[b] 2 Burn's E. L., Convocation. [c] 12 Co. 72.

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sacerdotii, that they will never from henceforth presume to attempt, allege, claim, or put in use, enact, promulge, or execute any new canons, institutions, ordinances, provincial or other, or by whatsoever name they shall be called in the convocation, unless the king's most royal assent and license may to them be had, to make, promulgate and execute the same, and that his majesty do give his most royal assent and authority in that behalf; it is therefore enacted, according to the said submission, that they, nor any of them, shall presume to attempt, allege, claim, or put in use any constitutions or ordinances provincial, by whatsoever name or names they may be called, in their convocations in time coming (which always shall be assembled by authority of the king's writ), unless the same clergy may have the king's most royal assent and license to make, promulge, and execute such canons, constitutions, and ordinances, provincial or synodal; upon pain of every one of the said clergy doing contrary to this act, and being thereof convicted, to suffer imprisonment and make fine at the king's will[d].

Constitution of the convocation.

The convocation of the province of Canterbury, therefore, of which alone we need speak, for that of York appears never to have been important, since the above act of submission, is summoned only by the archbishop's writ, under the king's direction. It consists, since the Reformation (that is, since the extinction of abbacies and priorships,) of the suffragan bishops forming the upper house; of the deans, archdeacons, a proctor or proxy for each chapter, and two from each diocese elected by the parochial clergy, who together constitute the lower house.[e] But in the province of York two proctors are elected for every archdeaconry: otherwise the number would be so small as scarcely to deserve the name of a provincial synod. The parochial clergy have consequently as great an interest in convocation there as the cathedral clergy. But in the province of Canterbury the lower house of convocation consists of twenty-two deans, twenty-four proctors of the chapters, fifty-three archdeacons, that is, ninety-nine of the cathedral clergy; while there are but forty-four proctors for the parochial clergy.[f] Only parsons, vicars and perpetual curates are capable of giving their votes in chusing proctors for the parochial clergy.[g] If any of the proctors die, the archbishop issues his mandate to the bishop of that diocese to elect another; and this, by virtue of the power inherent in him to summon his suffragan

Proctors.

Of the province of York.

By whom chosen.

[d] 25 Hen. 8, c. 19. [e] Hallam, Const. Hist. of Engl. ch. 16.
[f] Wake. 34; 2 Burn's E. L., Convocation. [g] Johns. 150.

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bishops, who being to obey him in all things lawful and honest, and the clergy their bishop in the like manner, they by that command make an election to supply the place of one of their proctors.[h] And as there are two houses of convocation, so there are two prolocutors; one of the bishops of the higher house, chosen by that house, another of the lower house, and presented to the bishops for their prolocutor.[i]

Office of the convocation.

In this assembly subsidies were granted, and ecclesiastical canons enacted; and in a few instances under Henry VIII. and Elizabeth, they were consulted on momentous questions affecting the national religion;[k] but this was as to their advice only, because the parliament have always insisted that their laws, by their own natural force, bind the clergy, as the laws of all christian princes did in the first ages of the church; whereas, on the other hand, the laws made by the convocation, even when they had received the royal assent and approbation, could not bind the laity.

Laws made by, do not bind the laity.

Even in matters of ecclesiastical jurisdiction.

Although, however, this latter proposition is now so clearly established, it does not appear to have been always considered so free from doubt in matters of *ecclesiastical jurisdiction;* for in a case in the King's Bench in 1736,[l] it was said,—This is a question of very extensive learning and of great consequence, upon which there is some appearance of variety in the law books; and the great length and careful nature of the judgment in that case may be taken as a strong proof that the law was not previously considered as fully settled. But nothing can be more clear and conclusive than the language of Lord Hardwicke in that case. "To argue first," he says, "from the general nature and fundamental principles of this constitution, nothing is so undoubtedly such, as that no new laws can be made to bind the whole people of this land, but by the king with the advice and consent of both houses of parliament, and by their united authority: neither the king alone, nor the king with the concurrence of any particular number or order of men, have this high power. To cite authorities for this would be to prove that it is now day. The binding force of these acts of parliament arises from that prerogative which is in the king as our sovereign liege lord, from that personal right which is inherent in the peers and lords of parliament, to bind themselves and their heirs and successors in their honours and dignities, and from the delegated power vested in the commons as

Judgment of Lord Hardwicke.

[h] Gilb. Exch. 58, 59; 2 Burn's E. L., Convocation.
[i] 4 Inst. 322.
[k] Hallam, ante.
[l] *Middleton* v. *Crofts*, 2 Atkyns, 650.

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the representatives of the people: and therefore Lord Coke says,[m] these represent the whole commons of the realm, and are trusted for them: by reason of this representation every man is said to be party to, and the consent of every subject is concluded in, an act of parliament: but in canons made in convocation, and confirmed by the crown only, all these are wanting except the royal assent; here is no intervention of the peers of the realm, nor any representations of the commons."

It follows from what has been here said, that no regulations made by the convocation could be binding even upon churchwardens, much less upon the people generally, even as regards church or churchyard, or other things ecclesiastical, or even as to the mode or ordering of Divine service. And as regards the clergy themselves, the following summary of what has been decided by the judges to be the full meaning of the Act of Submission shows that the power of the convocation over them is very limited; for it has been resolved upon that statute,[n]

Limited power of the convocation in making canons.

1. That a convocation cannot assemble at the convocation without the *consent* of the king.

2. That after their assembly, they cannot confer to constitute any new canon without the *assent* or license of the king.

3. When they, upon any conference, conclude any canons, yet they cannot execute any of their canons without the royal assent.

4. That they cannot execute any after the royal assent, but with these four limitations.

   a. That they be not against the prerogative of the king, nor
   b. Against the common law, nor
   c. Against any statute law, nor
   d. Against any custom of the realm.

Decline of the convocation.

The power of the convocation to make ecclesiastical regulations, is, moreover, by inference still further limited by other acts of parliament, such as by the acts of uniformity under Elizabeth and Charles II.; and especially by that confirming (and thereby rendering unalterable, without the sanction of parliament,) the Thirty-nine Articles.

Accordingly the power of convocation being thus limited, it appears that from the time of the Act of Submission, they had very little to do but to grant subsidies, which, however, after that time, were always confirmed by an act of parliament: an intimation that the legislature did

[m] 4 Inst. 1.

[n] T. 8 Ja.; Burn, ante.

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not wholly acquiesce in their power of binding the clergy in a matter of property:[o] nevertheless the clergy continued to tax themselves in convocation as before, and these assemblies were regularly kept up until the thirteenth year of Charles II., when the clergy gave their last subsidy. And by a private agreement, as it has been called, between the Archbishop and Lord Chancellor Clarendon, the clergy agreed silently to waive the privilege of taxing their own body, and to permit themselves to be included in the money bills prepared in the House of Commons. The first public act relating to this was in 1665, by which the clergy were, in common with the laity, charged with the tax imposed in that act, and were discharged from the payment of the subsidies they had before granted in convocation: but in this act there is an express saving of the right of the clergy to tax themselves in convocation if they think fit.[p] The two subsidies which the convocation had already granted were thus remitted as a sort of recompence, and the clergy were thenceforth allowed to vote at elections. Upon this it has been remarked, that the clergy made a barter of power for profit, — but the power they gave up was merely nominal,—and there can be little doubt, but that the power of self-taxation had proved a useless and expensive privilege; for the influence of the king in the convocation would always be very considerable, by reason of the ecclesiastical preferment in his gift; and the subsidies granted by them would consequently be higher than the fair proportion which they ought to bear in comparison with the laity. And as the authority and pre-eminence of the church at that time stood very high, it could not then have seemed the abandonment of an important privilege.[q]

Self-taxation by the clergy discontinued.

Cessation of all business in the convocation.

The original object therefore, for which the clergy had been summoned to meet in convocation, no longer existed after the early part of the reign of Charles II. The power of making fresh canons, which they had gradually assumed, had been, by the Act of Submission, so far limited, as to be almost nugatory; and it was a natural consequence of this cessation of all business, that the convocation, after a few formalities, either adjourned itself, or was postponed by a royal writ.

Subsequent revival of the convocation.

But after the Revolution of 1688, at a time when party spirit was very high, no less among ecclesiastics than among the laity, the sittings of the convocation were

[o] Hallam's Const. Hist. Ch. 16.
[p] Onslow's Note on Burnet, Oxf. ed. 4, 508.
[q] Hallam's Const. Hist. ch. 16.

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revived: questions affecting the Church and doctrine were agitated there with much violence, and the convocation for a time appeared to assume an importance which it had never attained previously. For as all their proper offices were at an end, they began to assume the difficult and dangerous task of fixing the standard of orthodoxy, and in 1711, the two houses of convocation concurred in censuring the tenets of Mr. Whiston, a professor at Cambridge, as favourable to Arianism. But a doubt arose as to their power. The archbishop doubted whether the assembly could proceed against a man for heresy: the judges were consulted, and the majority of them gave it as their opinion that the convocation had a jurisdiction. Four of them however professed the contrary sentiment, which they maintained from the statutes made at the Reformation. The queen, in a letter to the bishops, said, that as there was now no doubt of their jurisdiction, she expected they would proceed in the matter. But fresh scruples arising, they determined to examine the book without proceeding against the author. And this was censured accordingly. The queen did not signify her pleasure on this matter, and the affair remained in suspense. In the year 1717, the convocation proceeded to examine two performances of Dr. Hoadley, Bishop of Bangor, and it was then that such confusion arose, that it was found necessary to put a stop to the proceedings by a prorogation. Since which time the convocation has never sat for business.[r] The question, therefore, which might become important, must be considered as still doubtful; whether, if the sittings of the convocation should be revived, they would have any legal right of examining questions of orthodoxy, or proceeding against supposed heretics?

Disputes and quarrels.

Any more detailed history of the last days of the convocation would be little edifying. The greater part of the time of the lower house was taken up in quarrelling with the bishops in the upper house; and in fact the inferior clergy in convocation appeared to be far more powerful and energetic, perhaps because less responsible from their numbers than their superiors; so that this anomalous position arose, that the parochial clergyman might have to choose between his allegiance to his diocesan or to the convocation. The wisdom of ancient times, which had left doubtful matters of doctrine to the decision of the superior clergy, and the anomalies which had been introduced in our country by a departure from that practice, now began to be apparent: and it was in a happy hour for the peace

[r] Smollett's Hist. of England, ch. 9.

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Its final prorogation.

and tranquillity of the established church that the convocation was finally prorogued in the year 1717. We have gone thus far into the legal history of the convocation, because it is dormant only, not extinct, and might at any time be resuscitated in such manner as it existed formerly by virtue of the queen's writ. Yet it is difficult to conceive for what useful purpose a convocation could now be summoned. They could not escape the taxes assessed upon them by the parliament: if they should choose to vote additional supplies, and the vote should be assented to by the king, yet it would now be obviously illegal, according to the interpretation before given to the Act of Submission, as being contrary to the custom of the realm. In matters of church discipline and doctrine, it is clear that a council of the prelates, to whose authority in such matters their inferior clergy are bound to defer, would be the most fit to determine such questions as might arise. Experience has sufficiently shown that the constitution of a double house is altogether ill adapted for such a purpose; and that in any attempt to settle a controversy, the two houses of convocation, by coming to different conclusions, might probably increase rather than remedy the evil. In the making of fresh canons, their power would be found much more limited, even than when they last met, by the various acts of parliament affecting ecclesiastical matters which have been passed since that time, and especially by the powers given to the ecclesiastical commissioners. In fact, the whole of the power which the convocation once exercised appears now to be transferred elsewhere, and to be capable of being exercised by other parties in a more full and complete manner. Should a convocation now attempt the enacting of canons, such an attempt would be in practice as useless as it would be difficult in point of law; and it is scarcely possible but that it would mischievously interfere with other powers which have been conferred by statute, or grown up by custom, in the interval since the convocation has been discontinued.

Reason against the probability or utility of its revival.

CHAPTER IV.

OF THE GOVERNMENT AND DISCIPLINE OF THE ECCLESIASTICAL BODY.

Restricted powers of the convocation.

In our last chapter we have spoken of what in times past might have been considered the legislative council of the

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ecclesiastical body. But however these councils may have taken upon themselves, at times, to condemn particular opinions, it does not appear, as we have already seen, that they legally had, or in fact ever exercised, any power or authority to admonish, suspend, or deprive, or in any manner to punish the individual members of their body.

For all immoral conduct, irregularity in discharge of duty, for preaching or maintaining false doctrines, and for all those various offences, ecclesiastical or other, which we shall notice in the course of this work, every ecclesiastical person may be called to account by his ecclesiastical superior.

Ecclesiastical courts.

The ecclesiastical superior here spoken of is usually termed the ordinary; and he, whether archbishop, bishop, or archdeacon, has his peculiar ecclesiastical court of justice, for the hearing and determining of matters and causes of ecclesiastical cognizance within his jurisdiction. But into the history and present state of those courts, it is not thought advisable here to enter; the constitution of these courts will probably soon undergo a considerable change, and the existence of many of them will be abolished: and so far as our present subject is concerned, their authority has been superseded by the act for the better enforcing church discipline, which we shall presently have to mention.

All proceedings against clergymen, as such, are to be according to the provisions of 3 & 4 Vict. c. 86.

The course of proceedings in these courts in the correction of persons ecclesiastical was tedious and unsatisfactory, and in the year 1840 there was passed an act of parliament [b] for the better enforcing church discipline, by which all other modes are superseded, and by which all proceedings at the present day, and for the future, are and will be regulated. For by that act it is expressly declared, that no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland, for any offence against the laws ecclesiastical, shall be instituted in any ecclesiastical court, otherwise than is enacted or provided in that act.[c]

Commission to issue in the first instance.

In every case of any clerk in holy orders of the United Church of England and Ireland, who may be charged with any offence against the laws ecclesiastical; or concerning whom there may exist scandal or evil report, as having offended against the said laws, the bishop of the diocese, on the application of any party complaining thereof, or if he so think fit, of his own mere motion, may issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon or rural

[a] 4th Inst. 388; Godol. Ab. 83.
[b] 3 & 4 Vict. c. 86.
[c] Sect. 23.

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dean within the diocese, for the purpose of making inquiry into the grounds of such charge or report.[d]

All kinds of offences may be thus inquired into.

Offences against the laws ecclesiastical here mentioned would seem to include every offence which could possibly be committed by an ecclesiastic, whether of criminal or immoral conduct, or of maintaining false doctrine, or of irregularity in the discharge of his duty. So that whether the charge be that of felony, or of drunkenness, for example, or other immorality, or of improperly performing the marriage service, refusing to bury or baptize, publishing doctrines in derogation of the book of common prayer or its contents, &c., the mode of proceeding is in every case the same; and this preliminary inquiry is in the first instance to be made into the truth or falsehood of the charge. Nor would a conviction in a criminal court, as it seems, supersede the necessity of first issuing the commission.

What do not contitute offences.

Here, however, it may be observed, that offences against the laws ecclesiastical are such only as may be known and defined; that is, it would not be in the power of any bishop to make any new law or ordinance to be observed by the clergy of his diocese, disobedience to or disregard of which would constitute an ecclesiastical offence. The bishop has the general superintendence of the morals of his clergy; and for any immoral conduct they may be punished by him under the provisions of this act. But the case would be altogether different in respect of matters of ecclesiastical law. In these the office of the bishop is that of a judge; he may enforce the existing law, but he cannot make a new one, much less exact obedience to it. For the clergy, although bound to obey their diocesan, so long as he acts according to law, owe a still higher allegance to the laws of their country, and would be bound to disobey their diocesan, if he should command any thing contrary to the general law. And so in that variety of matters as to which there exists no positive law, the bishop would be equally unable to make one for his diocese or the archbishop for his province which it would be any ecclesiastical offence to disobey. Nor does there now exist any method by which laws could be made binding upon the clergy either in matters civil or ecclesiastical, except by the authority of parliament.[e] And even should the convocation be reassembled, it will be seen from the last chapter how difficult, if not impossible, would be any attempt to exercise such an authority.[f]

[d] Sect. 3.

[e] See *Middleton* v. *Crofts*, 2 Atk. 650, and the whole judgment there pronounced.

[f] It is here suggested that possibly it might be advantageous to the peace of

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Preliminaries before issuing the commission.

A notice of the intention to issue the commission under the hand of the bishop, containing an intimation of the nature of the alleged offence, with the names, addition, and residence of the party applying for the commission, must be sent by the bishop to the accused party fourteen days at least before issuing the commission; and it should be remembered that every particular required in this notice must be strictly and exactly complied with.[g]

Proceedings of the commissioners.

The commissioners, when appointed, are to proceed to examine witnesses upon oath, to ascertain whether there be sufficient *primâ facie* grounds for instituting any further proceedings against the accused party. Notice of the time and place of their meeting for these purposes must be given under the hand of one of them to the accused party seven days at least before the meeting; and the accused party, or an agent on his behalf, may attend the proceedings of the commissioners, and may cross-examine the witnesses produced in support of the charge, or produce and examine witnesses for their defence; or the commissioners may themselves summon any witnesses whom they may think necessary or proper.[h]

Proceedings to be public unless on the application of the accused.

These preliminary proceedings are to be public, unless on the special application of the accused party, in which case the commissioners shall direct that the whole or any part of the proceedings shall be private: upon which subject it does not appear that they may exercise any discretion, but the application of the accused party for a private hearing must be allowed. And when these proceedings, whether public or private, shall have been closed, one of the commissioners shall openly and publicly declare the opinion of the majority, whether there be sufficient *primâ facie* ground for instituting further proceedings.[i]

Depositions of the witnesses and the report.

The commissioners, or any three of them, shall transmit to the bishop, under their hands and seals, the depositions of the witnesses taken before them, and the opinion of the majority of the commissioners present at the inquiry, as to whether there be any ground for further proceedings, which report is to be filed in the registry of the diocese; and if the party accused hold any preferment in any other diocese, the bishop to whom the report is made is to transmit a copy thereof and of the depositions to the bishop of such other diocese; and also, upon the application of

the church if a power were given to the ecclesiastical commissioners, now including all the bishops, to determine doubtful matters of a certain class; which determination might, if confirmed by the queen in council, thenceforth have the authority of law. The expediency and propriety of leaving such matters to parliamentary decision appears doubtful.

[g] Sect. 3. [h] Sect. 4. [i] Ibid.

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the party accused, he is to cause a copy of the same to be delivered to him on payment of a reasonable sum, not exceeding two-pence for each folio of ninety words.[k]

Sentence may be pronounced by consent at any stage of the proceedings.

At this stage of the proceedings, or at any other, if both the party accused and the party complaining consent in writing, the bishop may, without any further proceedings, pronounce such sentence as he may think fit: provided it does not exceed the sentence which might have been pronounced in due course of law. And all such sentences are good and effectual, and to be enforced by the same means, as if pronounced after a regular hearing as hereafter mentioned.[l]

Articles to be drawn up,

If the commissioners report that there is ground for further proceedings, and the bishop, or the party complaining, thereupon thinks proper to proceed further against the accused, articles are to be drawn up to be approved and signed by an advocate practising in Doctors' Commons, which, together with a copy of the depositions taken before the commissioners, are to be filed in the registry of the diocese: and the party complaining and the accused, or any one on behalf of such parties, is entitled to inspect these documents without fee; and on demand may have from the registrar copies of the same, on payment of a sum not exceeding two-pence for each folio of ninety words.[m]

and served on the accused.

A copy of the articles so filed in the registry of the diocese is to be forthwith served upon the party accused personally, or by leaving them at the residence house of any preferment holden by him, or, if there be no such house, at his usual or last known place of residence: and such articles cannot be proceeded on until fourteen days have expired after the day on which the copy was so served.[n]

And here it may be observed, that every notice and requisition given or made in pursuance of this act must be served on the party to whom it relates in the same manner as here directed with respect to the service of the articles.[o]

Bishop may summon the accused before him.

At any time after the expiration of the fourteen days the bishop may require the party accused to appear before him personally or by his agent, at the option of the accused, to answer the articles within such time as the bishop may think proper; and if the party, when he appears, admits the truth of the articles, the bishop, or his commissary appointed for that purpose, may at once pass sentence on him according to the ecclesiastical law.[p]

Proceedings by the bishop.

[k] Sect. 5. [l] Sect. 6. [m] Sect. 7.
[n] Sect. 8. [o] Sect. 10. [p] Sect. 9.

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Assessors.

If, on the other hand, the party accused refuses or neglects to appear, or, upon appearance, makes any other answer to the articles than an unqualified admission of their truth, the bishop may proceed to hear the cause, with the assistance of three assessors, to be nominated by him; and, upon hearing the cause, the bishop shall determine the same, and pronounce sentence.[q]

Of the three assessors here spoken of, one must be either

An advocate, who has practised not less than five years in the court of the archbishop of the province; or,

A serjeant at law; or,

A barrister of seven years standing at the least; and another of them must be either

The dean of his cathedral church, or one of his cathedral churches, if more than one within the diocese; or,

One of his archdeacons, or his chancellor.[r]

Substituted for proceedings in the ecclesiastical court

All sentences thus pronounced by the bishop or by his commissary, in pursuance of this act, are as good and effectual in law, and may be enforced by the same means, as a sentence pronounced by an ecclesiastical court.[s]

When bishop is patron of the living.

It may be here observed that it is provided, that in case the bishop, who would otherwise have to act in any of these proceedings, happens to be the patron of any preferment held by the party accused, the archbishop of his province shall in all cases act in his stead, save only in the sending a case by letters of request to the court of appeal; which a bishop, being the patron, is allowed to do notwithstanding.

Case may be sent to court of appeal by letters of request.

In any case in which the bishop may think fit, he is empowered, either in the first instance, or after the report of the commissioners that there is ground for further proceedings, and before filing the articles, but not afterwards, to send the case by letters of request to the court of appeal of the province, to be there heard and determined.[t] Nor will it be any valid objection to the sending such letters of request that the bishop has already given notice of issuing a commission, and that such notice has not been withdrawn. It will be considered in such a case as sending the case by letters of request in the first instance;[u] in which case the judge of that court may make any orders of court for the purpose of expediting the suit, or improving the practice of the court, or may alter or revoke such orders; and, except by the permission of the judge, there cannot in such cases be any appeal from any interlocutory decree.[x]

[q] Sect. 11. [r] Ibid. [s] Sect. 12.
[t] Sect. 13. [u] *Sanders* v. *Head*, 3 Curt. 32. [x] Sect. 13.

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Appeal.

If judgment is pronounced in the first instance by the bishop, the first appeal is to the archbishop, to be heard in the court of appeal of the province: and the appeal from that court, whether the cause shall have been heard there in the first instance by letters of request, as before mentioned, or upon appeal from the decision of the bishop, is to the queen in council; and to be heard before the judicial committee of the privy council.[x] A minister therefore, accused as before mentioned, has the privilege of four several hearings before he can be finally condemned.

First. Before the commissioners of the bishop.

Second. Before the bishop or commissary and his assessors.

Third. Before the court of appeal of the province.

Fourth. Before the judicial committee of the privy council.

Appeal to privy council.

With respect to the last of these hearings before the privy council, it is provided that every archbishop and bishop, who may be members of the privy council, shall be considered members of the judicial committee of the privy council for the purposes of hearing every such appeal; nor can such appeal be heard unless one at least of such archbishops or bishops be preseht. But the archbishop or bishop who may have issued the commission, or heard the case, or sent it by letters of request to be tried, is excepted from the privilege of sitting as a member of the judicial committee when such cause is heard.[y]

Powers of the ecclesiastical court transferred to parties constituted judges.

In all or any of these proceedings the commissioners, bishop, commissary, assessors, or judge have the same powers for compelling the attendance of witnesses, the production of necessary documents, and for the examining witnesses upon oath, as belong to the ecclesiastical courts.[z]

Every such suit or proceeding must be instituted within two years after the commission of the offence complained of, within which time it may be instituted, notwithstanding any act to the contrary;[a] but if, after the two years have elapsed, a minister should be convicted of an offence in a court of common law, such suit or proceeding may be brought at any time within six calendar months after such conviction.[b] Nothing, therefore, short of an actual conviction in a court of law for an offence will justify any proceedings in consequence of the offence, supposing two years to have elapsed since it was committed. So that, if

[x] Sect. 15. [y] Sect. 16. [z] Sects. 17, 18.

[a] See 27 G. 3, c. 44, declared by this act not to apply to cases contemplated by it.

[b] Sect. 20.

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the charge should not be made known to the bishop within that time, no notice can be taken of it; and if the charge should be one of general immorality, consisting of a number of minor acts, any evidence to support the charge must be confined to those acts committed within the two years.

Ministers of peculiars, or exempt places, are nevertheless subjected to the proceedings under this act. The peculiars of any archbishopric or bishopric, though locally situate in another diocese, are, for the purposes of the act, subjected to the archbishop or bishop to whom they belong; and all other peculiars are, for the purposes of the act, subjected to the authority of the archbishop or bishop within the limits of whose province or diocese they are situate. And where any peculiar is locally situate between the limits of the two provinces, or between the limits of any two or more dioceses, the same is subjected to the authority of the archbishop or bishop of the cathedral church to whose province or diocese such peculiar is nearest in local situation.[c]

Ministers of peculiars, &c. To whom subjected.

Before judgment pronounced, and at any time during the pendency of any such proceedings, if it should appear to the bishop that great scandal is likely to arise from the party accused continuing to perform the service of the church, or that his ministry will be useless while the charge is pending, the bishop may cause a notice to be served on him, inhibiting him from performing any service of the church within the diocese, from the expiration of fourteen days after service of the notice, and until sentence shall have been pronounced. But if the party accused be an incumbent, he may, within fourteen days after service of the notice, nominate a fit person to the bishop to perform the services of the church during the time while he is so inhibited. And if such person is approved of by the bishop, he may be licensed by him accordingly; or in case no fit person shall be nominated by the incumbent, the bishop shall make such provision for the service of the church as he shall think necessary. In all cases, the stipend to such person is to be assigned by the bishop, and is not to exceed the stipend by law required for the curacy of the church,[d] and not exceeding the moiety of the net annual income of the benefice, the payment of which stipend may, if necessary, be provided for by sequestration. And such inhibition and license may be revoked by the bishop at any time that he may think fit.[e]

Bishops may inhibit the accused from performing service pending the proceedings.

[c] Sect. 22. [d] See post, Stipendiary Curates. [e] Sect. 14.

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In a case where articles containing a great variety of charges had been exhibited against a clergyman, sentence of suspension had been passed in the Ecclesiastical Court; and after sentence, the defendant moved for a prohibition, on the suggestion that some of the articles contained charges cognizable in courts of common law; but it was not denied that others were of ecclesiastical cognizance. The prohibition was refused, on the ground that it must be presumed, after sentence, that the Ecclesiastical Court had proceeded upon those matters which were within its cognizance.[f]

Punishments.

It does not appear necessary here to enter into the various punishments, which may be imposed by the bishop, or by the Ecclesiastical Courts, or judicial committee of the privy council, for offences against the laws ecclesiastical, of which a minister may under these proceedings have been found guilty, as they will for the most part be found mentioned under other heads, when we come to mention the offences themselves more particularly. It may be sufficient here to state, that they vary, from the slight punishment of a monition to abstain from such conduct for the future, to the heavy penalty of an imprisonment for life, which the Ecclesiastical Courts are, in some cases, empowered to inflict for second or third offences of the same nature; but by far the most usual punishment is that of suspension *ab officio et a beneficio*, from performance of duty, and from the emoluments of the living, for a greater or less period, according to the nature of the offence. Of the consequences of such a sentence, as also of that of the greater one of deprivation, and of the mode in which they are enforced, we shall have to speak in another chapter.[g]

Ultimate appeal in ecclesiastical causes.

We have seen that the ultimate appeal in each case from the sentence of the bishop or archbishop, and in fact, it may be added, from all decisions of any ecclesiastical tribunal, is to the king in council, as supreme head of the Church; and that such appeals are now heard and determined by the judicial committee of his privy council. Before the Reformation, the ultimate appeal in the ecclesiastical causes was to the Pope; and when that was taken away, in the twenty-fifth year of Henry VIII., a court of delegates was constituted for each separate case, by commission under the great seal, to certain persons delegated thereby to hear and determine the particular cause. In ordinary cases, the delegates were three puisne judges, one from each court of common law, and three or more civilians;

Formerly.

[f] *Hart* v. *Marsh*, 5 Ad. & Ell. 591.

[g] *Vide post*, Suspension, Deprivation, and Degradation.

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but in special cases, a fuller commission was sometimes issued, consisting of spiritual and temporal peers, judges of the common law, and civilians, usually three of each description.[h]

The decision of the court of delegates was final, no further appeal lying as matter of right; but a petition might have been presented to the king in council for a commission of review. This petition was referred to the Lord Chancellor, who, after hearing counsel on both sides, advised the king thereon.

At present.

By the stat. 2 & 3 Will. IV. c. 92, the jurisdiction of the court of delegates was, by the recommendation of the ecclesiastical commissioners, transferred to the privy council; and various directions were given that the appellants to this new tribunal should have precisely the same rights and privileges, and that the council should have the same powers as if the appeal had been to the court of delegates.

Judicial committee of the privy council.

The court of the judicial committee of the privy council, in its present form, was directed, and its proceeding regulated, by a statute passed in the following year; and that court of ultimate appeal in all causes ecclesiastical is by the statute[i] constituted as follows:—

Constitution of the court.

The President for the time being of his Majesty's Privy Council, the Lord High Chancellor of Great Britain for the time being, and such of the members of his Majesty's Privy Council as shall from time to time hold any of the offices following, that is to say, the office of Lord Keeper or First Lord Commissioner of the Great Seal of Great Britain, Lord Chief Justice, or Judge, of the Court of King's Bench, Master of the Rolls, Vice-Chancellor of England, Lord Chief Justice, or Judge, of the Court of Common Pleas, Lord Chief Baron, or Baron, of the Court of Exchequer, Judge of the Prerogative Court of the Lord Archbishop of Canterbury, Judge of the High Court of Admiralty, and Chief Judge of the Court in Bankruptcy, and also all persons members of his Majesty's Privy Council, who shall have been president thereof, or held the office of Lord Chancellor of Great Britain, or shall have held any of the other offices herein before mentioned, shall form a committee of his Majesty's said Privy Council, and shall be styled "The Judicial Committee of the Privy Council." Provided nevertheless that it shall be lawful for his Majesty from time to time, as and when he shall think fit, by his sign manual, to appoint any two other persons, being privy councillors, to be members of the said committee.[k]

[h] 4 Inst. 339. [i] 3 & 4 Will. 4, c. 41. [k] Sect. 1.

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Number of judges present.

No matter shall be heard, nor shall any order, report or recommendation be made, by the said judicial committee, in pursuance of this act, unless in the presence of *at least four members* of the said committee; and no report or recommendation shall be made to his majesty, unless a majority of the members of such judicial committee present at the hearing shall concur in such report or recommendation: provided, that nothing herein contained shall prevent his majesty, if he shall think fit, from summoning any other of the members of his said privy council to attend the meetings of the said committee.[l]

But it shall be lawful for his majesty, by order in council, or special direction under his royal sign manual, having regard to the nature of the said appeal or other matter, and in respect of the same not requiring the presence of more than three members of the said committee, to order that the same be heard; and when so ordered, it shall be lawful that the same shall be accordingly heard *by not less than three of the members* of the said judicial committee, subject to such other rules as are applicable to the hearing and making report on appeals and other matters by four or more of the members of the said judicial committee.[m]

When bishops are to sit as judges.

And in several of those cases of appeals in ecclesiastical causes which have been mentioned, it is provided, that every bishop and archbishop of the United Church of England and Ireland, who may be a member of the privy council, shall be a member of the judicial committee, for the purpose of hearing such appeals; so that in those cases which are, in the more strict sense of the word, ecclesiastical, the ultimate court of appeal is of a mixed character, composed partly of laymen and partly of ecclesiastics; wherein, if as many of the latter as are qualified should choose to attend, they would probably usually constitute a majority.[n]

Proceedings of the court.

The following are the regulations for the proceedings of the court upon the hearing of appeals.

In any matter, which shall be referred to such committee, they may examine witnesses by word of mouth (and either before or after examination by deposition), or direct that the depositions of any witness shall be taken in writing by the registrar, or by such other person or persons, and in such manner, order and course, as his majesty in council or the said judicial committee shall appoint and direct; and the said registrar, and such other person or persons so to be appointed, shall have the same powers as are now

[l] Sect. 5. [m] 6 & 7 Will. 4, c. 38. [n] See post, Bishops, &c.

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possessed by an examiner of the High Court of Chancery or of any court ecclesiastical.[o]

Witnesses.

In any matter which shall come before them, it shall be lawful for the said committee to direct that such witnesses shall be examined, or re-examined, and as to such facts as to the said committee shall seem fit, notwithstanding any such witnesses may not have been examined, or no evidence may have been given on any such facts in a previous stage of the matter; and it shall also be lawful for his majesty in council, on the recommendation of the said committee, upon any appeal, to remit the matter which shall be the subject of such appeal to the court, from the decision of which such appeal shall have been made; and, at the same time, to direct that such court shall rehear such matter, in such form, and either generally or upon certain points only; and upon such rehearing take such additional evidence, though before rejected, or reject such evidence before admitted, as his majesty in council shall direct.

May direct issues to be tried.

The committee may further direct issues to try any fact, and may direct the depositions to be read at such trial, and may make such orders as to the admission as are used to be made in like cases by the Court of Chancery; and may direct new trials of such issues generally, or upon certain points only.[p]

References to the registrar.

The committee may also refer any matters to be examined and reported on to the registrar, or to such other person or persons as shall be appointed by his majesty in council, or by the said judicial committee, in the same manner and for the like purposes as matters are referred by the Court of Chancery to a master of the said court; and for the purposes of this act, the registrar, and the person or persons so to be appointed, shall have the same powers and authorities as are now possessed by a master in chancery.[q]

The president for the time being of the privy council may require the attendance of any witnesses, and the production of any deeds, evidences or writings, by writ to be issued by such president, in such and the same form, or as nearly as may be, as that in which a writ of subpœna ad testificandum, or of subpœna duces tecum, is now issued by his majesty's Court of King's Bench at Westminster; and every person disobeying any such writ so to be issued by the president, shall be considered as in contempt, and shall also be liable to such penalties and consequences as if such writ had issued out of the Court of King's Bench, and may be sued for such penalties in the said court.[r]

[o] 3 & 4 Will. 4, c. 41, s. 7.
[p] Sects. 10, 11, 12, 13.
[q] Sect. 17.
[r] Sect. 19.

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Time for appealing.

All appeals shall be made within such time respectively as the same may now be made, where such time may be fixed by any law or usage; and where there is no such law or usage, then within such time as shall be ordered by his majesty in council; but with regard to the time of appealing in ecclesiastical matters, such as appeals from sentences of the bishops under the Church Discipline Act, from their orders as to residence, &c., from orders declaring bishops incapacited, and several others, the time within which the appeal must be prosecuted is expressly limited in each case, and will be found mentioned in each case in the places where those subjects are treated of.

Orders enforced against persons pronounced contumacious.

The judicial committee have the power of committing to prison for contempt of court;[s] and in all causes of appeals from ecclesiastical courts, in which any person, duly monished or cited, or required to comply with any lawful order or decree, and neglecting or refusing to pay obedience to such lawful order or decree, or committing any contempt of the process in ecclesiastical causes, shall reside out of the dominions of her majesty, or shall have privilege of peerage, or shall be a lord of parliament, or a member of the House of Commons, it shall be lawful for the said judicial committee, or their surrogates, to pronounce such person to be contumacious and in contempt, and, after he shall have been so pronounced contumacious and in contempt, to cause process of sequestration to issue under the said seal of her majesty against the real and personal estate, goods, chattels and effects, wheresoever lying within the dominions of her majesty, of the person against or upon whom such order or decree shall have been made, in order to enforce obedience to the same, and payment of the expenses attending such sequestration, and all proceedings consequent thereon; and to make such further order in respect of, or consequent on, such sequestration; and in respect to such real and personal estate and effects sequestrated thereby, as may be necessary; or for payment of monies arising from the same to the person to whom the same may be due; or into the registry of the High Court of Admiralty and Appeals, for the benefit of those who may be ultimately entitled thereto.[t]

Costs of appeals.

The costs, as well of defending any decree or sentence appealed from, as of prosecuting any appeal, or in any manner intervening in any cause of appeal, and the costs on either side, or of any party, in the court below, and the costs of opposing any matter which shall be referred to the judicial committee, and the costs of all such issues as

[s] 6 & 7 Vict. c. 38, sect. 7. [t] Sect. 8.

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shall be tried by their direction respecting any such appeal, shall be paid by such party as the said judicial committee shall order[u]. And such costs arising out of any ecclesiastical cause of appeal shall be taxed by the registrar of the High Court of Admiralty of England for the time being, who may be appointed to be registrar of the queen in ecclesiastical causes, and who is empowered to appoint an assistant registrar, and who shall, while he shall be registrar of the High Court of Admiralty, hold his office of registrar of her majesty in ecclesiastical causes; and shall do all such things, and shall have the same powers and privileges in respect to the same as belong to his predecessors in the office of registrar of her majesty in ecclesiastical causes.[x]

The surrogates and examiners of the Arches Court of Canterbury, and such persons as shall from time to time be appointed surrogates or examiners of the said court, shall be surrogates and examiners of the judicial committee of the privy council in all causes of appeal from ecclesiastical courts.[y]

CHAPTER V.

THE ECCLESIASTICAL COMMISSION.

Origin of.

This commission, which must now and henceforth be regarded as a most important part of our Church establishment, and to which a great part of the power and authority, both of the parliament and of the supreme head of the Church has been delegated, is of very recent origin. In the early part of the year 1835, the general feeling of dissatisfaction with all existing institutions which then for a time pervaded the nation, had extended to the Established Church; and the chief authorities of the Church at that time, mistaking a transient effervescence for an expression of settled hostility to the establishment, became anxious to effect of themselves those extensive changes which they feared would otherwise be carried on by others. The consequence of this feeling on the part of the heads of the Church was the establishment of the *Ecclesiastical Commission*, which, by reason of the several powers that have at subsequent times been conferred upon it, may probably be productive of much good to the Church establishment; and may be able, in some degree, to compensate for the unfortunate errors which caused its origin.

[u] Sect. 12. [x] Sect. 13. [y] Sect. 3.

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Error commi d in its origin.

For, in its origin, the important principle on which the inviolability of the Church establishment depends, that the Church generally possesses no property as a corporation, or which is applicable to general purposes; but that each particular ecclesiastical corporation, whether aggregate or sole, has its property separate, distinct, and inalienable, according to the intention of the original endowment, was given up without an effort to defend it. The wealthier endowments of our ecclesiastical corporations aggregate,—the reward and dignified ease of many who had spent their lives in the arduous discharge of the duties of their professions, and the inducement alike to the higher ranks of society and to brighter talents to undertake those duties, and which had rendered the body of our clergy so superior to those of other countries,—were overthrown and ruined without a struggle. The regrets, both of laymen and ecclesiastics, and the dissatisfaction of the commissioners themselvees at the results of the labours of their commission, have unfortunately come too late. Establishments which had survived the Reformation were not found sufficiently utilitarian to survive the scrutiny of commissioners, who were, for the most part, selected from ecclesiastics. But the Church cannot complain of a spoliation which would probably never have been attempted, had its members shown the slightest resistance; nor unless those members had themselves been desirous to effect the extensive change.

The consequence of this feeling was, that in February, 1835, two commissions were issued to persons therein named, directing them to consider the state of the several dioceses in England and Wales, with reference to the amount of their revenues, and the more equal distribution of episcopal duties, and the prevention of the necessity of attaching by commendam to bishoprics, certain benefices with cure of souls, and to consider also the state of the several cathedral and collegiate churches in England and Wales, with a view to the suggestion of such measures as might render them conducive to the efficiency of the Established Church, and to provide the best mode of providing for the cure of souls, with special reference to the residence of the clergy on their respective benefices. And it was provided, that in the meantime, where certain specified dignities or benefices should become vacant, all the profits and emoluments arising from them should be paid to the treasurer of Queen Anne's Bounty, to whom were granted the same remedies for recovering these profits, &c. as a successor would have had, provided that he should

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have no power to grant a lease or present to benefices. And it was provided, that such treasurer should keep an account of all receipts, and allow all costs, expenses, and outgoings which would have fallen on the deceased incumbent.[a]

First report of the commissioners.

These commissioners, by their report, recommended that commissioners should be appointed by parliament for the purpose of preparing and laying before the king in council such schemes as should appear to them to be best adapted for carrying into effect a number of recommendations which were mentioned in a very general manner in their report, and that the king in council should be empowered to make orders ratifying such schemes and having the full force of law.

Original members of the commission.

In consequence of this recommendation, it was enacted,[b] that the following persons, namely, the Archbishop of Canterbury for the time being; the Archbishop of York, and the Bishop of London for the time being; the Bishop of Lincoln; the Bishop of Gloucester; the Lord Chancellor; the Lord President of the Council; the Lord High Treasurer, or the First Lord of the Treasury; and the Chancellor of the Exchequer, for the time being respectively, and such one of his Majesty's principal Secretaries of State as shall be for that purpose nominated by his Majesty under his royal sign manual (such Lord Chancellor, Lord President, Lord High Treasurer, or First Lord of the Treasury, Chancellor of the Exchequer, and Secretary of State, being respectively members of the United Church of Great Britain and Ireland), the Earl of Harrowby, the Right Honourable Henry Hobhouse, and the Right Honourable Sir Herbert Jenner, should, for the purposes of the act, be one body politic and corporate, by the name of "The Ecclesiastical Commissioners for England." And that by that name they should be a corporation, having perpetual succession and a common seal, and sue and be sued, and have power and authority to take, purchase, and hold lands and hereditaments, to them and their successors, for the purposes of the act, notwithstanding the Statutes of Mortmain.[c]

Constituted a corporation.

Their successors.

As to the successors of the commissioners thus named, it was provided that when any vacancy should occur, by death, resignation or otherwise, among the two last-named bishops, and the three last-named lay commissioners, or among such of the future commissioners as should not have become such commissioners by virtue of any dignity or office, according to the provisions of the act, it should

[a] 5 & 6 Will. 4, c. 30. [b] 6 & 7 Will. 4, c. 77. [c] Sect. 1.

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be lawful for his majesty to fill up such vacancy by appointing under his royal sign manual, instead of any such commissioner, being a bishop, some other bishop of England or Wales, and instead of any such commissioner being a layman, some other layman, being a member of the said church, to be a commissioner; and that every such bishop or person so to be appointed should accordingly become to all intents and purposes one of the commissioners for the purposes of the act.[d]

Additional commissioners.

But in addition to the persons who were thus at first constituted commissioners, the following persons have been since appointed, and are now members of the commission, namely, all the bishops of England and Wales for the time being respectively, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the Judge of the Prerogative Court, the Judge of the High Court of Admiralty, for the time being respectively (such Chief Justices, Master of the Rolls, Chief Baron, and Judges being respectively members of the United Church of England and Ireland), the Deans of the cathedral churches of Canterbury and St. Paul, in London, and of the collegiate church of St. Peter, Westminster, for the time being respectively; and also four such lay persons (being members of the said United Church) as shall be duly appointed by her majesty, under her royal sign manual, and such other two lay persons (being members of the said United Church) as shall be duly appointed by the Lord Archbishop of Canterbury for the time being under his hand and archiepiscopal seal.[e]

Their successors.

As to the successors of these commissioners, it is provided that when any vacancy shall occur among such six last-mentioned commissioners, by death, resignation or otherwise, it shall be lawful for her majesty, or for the said archbishop, as the case may be, to fill up such vacancy by the appointment of some other lay person (being a member of the said United Church) to be a commissioner; and the person so appointed shall thereupon become and be an ecclesiastical commissioner.[f]

All these commissioners have now equal power; but it should be remarked, that those last named were not added to the commission until after the overthrow of the cathedral and collegiate establishments, the annihilation of two bishoprics, and a variety of other extensive and important alterations, had been recommended, and so far acted on,

[d] Sect. 2. [e] 3 & 4 Vict. c. 113, s. 76. [f] Sect. 79.

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as to render it impossible for the commission to retrace its steps.

All these commissioners, not being bishops or archbishops, before acting under the commission, are, at the first meeting they attend, to subscribe in the book of the minutes of the proceedings of the commissioners, the following declaration: Subscribing declaration.

"I do hereby solemnly, and in the presence of God, testify and declare, that I am a member of the United Church of England and Ireland as by law established. Witness my hand, this —— day of ——."[g]

The commissioners hold their appointments as long as they well demean themselves in the execution of their duties, and five of them constitute a quorum, provided that due notice of the meeting has been given to all. The quorum.

But no proceeding which requires the common seal of the corporation is to be finally concluded, nor is the seal to be affixed to any deed or instrument, unless two at least of the episcopal commissioners are personally present; and if any two episcopal commissioners, being the only episcopal commissioners present, object to the ratification of such proceeding, or to the affixing of the common seal, such ratification or affixing is not to take place until a subsequent meeting.[h] But if any commissioner is out of England or Wales, or has intimated to the secretary that, for any specified time, he will be unable to attend the meetings, no notice of the meetings need be sent to him; but in such a case nothing can be done at a meeting affecting such commissioner, being a bishop or dean, or affecting his see or diocese, or cathedral or collegiate church, without his consent in writing previously obtained. Superior powers of the episcopal commissioners.

The commissioners may, at any meeting duly convened, continue and adjourn such meeting from day to day, for any such number of days as they shall deem necessary; and their proceedings, and all acts, matters and things done and executed by them, on each and every of such days of adjournment, shall be as valid and effectual to all intents and purposes as if they had been done and executed on the first day of such meeting. But no proceeding, which requires to be ratified and confirmed by the common seal, shall be finally concluded by affixing such seal on any such day of adjournment, unless notice of the intention to propose any such proceeding for final consideration and decision shall have been sent, together with every notice issued for such first day of meeting. Adjournment of meetings.

[g] 6 & 7 Will. 4, c. 77, s. 3; 3 & 4 Vict. c. 113, s. 80.
[h] 6 & 7 Will. 4, c. 77, s. 5.

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The chairman.

At each meeting of the commissioners, the commissioner first in rank and precedence there present shall preside as chairman; and in case of the equality in rank of all the commissioners so present, then the senior commissioner, in the order of appointment, shall so preside; and the chairman at all such meetings shall not only vote as a commissioner, but shall also, in case of the equality of votes, have the casting or decisive vote.[i]

The commissioners were directed to appoint a secretary, treasurer, and other officers, removable at pleasure. The amount of whose salaries was to be regulated by the Lords of the Treasury, or by any three of them; the secretary to keep a book, and enter the minutes of the proceedings, and the names of the commissioners present; the entry of the proceedings to be signed by the chairman.

Treasurer and secretary.

But it has been since enacted, that the offices of treasurer and secretary shall be united, and be one office; and shall be held so long as the person occupying them shall well demean himself: and that, upon any vacancy, the commissioners shall appoint a successor by an instrument in writing under their common seal.[k]

Powers of the commissioners to make inquiries.

The commissioners, by summons under the hand of the chairman, may require the attendance of any person whom they shall think fit to examine touching any matter within their cognizance, and may make any inquiries, and call for any answers or returns, as to any such matter, and administer oaths, and examine upon oath, and cause to be produced before them upon oath, all statutes, charters, grants, rules, regulations, bye-laws, books, deeds, contracts, agreements, accounts, and writings whatsoever, or copies thereof respectively, in anywise relating to any such matter; or, in lieu of requiring such oath, the commissioners may, if they think fit, require any such person to make and subscribe a declaration of the truth of his examination.[l]

Schemes by the commissioners.

The commissioners, being thus constituted, and enabled to make due inquiry, are, from time to time, to prepare and lay before the queen in council such schemes as appear to them to be required, several of which are noticed in other parts of this work. And, in such schemes, they are to recommend and propose such further measures as may appear to them necessary for carrying out such schemes. But previously to laying any such scheme before the queen in council, notice thereof is to be given to any corporation, aggregate or sole, which may be af-

[i] Sect. 6.
[k] 3 & 4 Vict. c. 113, s. 91.
[l] 6 & 7 Will. 4, c. 77, s. 9.

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fected thereby; and the objections, if any, of such corporation, are to be laid before the queen in council, together with such scheme.[m]

When any such scheme shall have been approved by the queen in council, she may make an order or orders ratifying the same, and specifying the time or times when such scheme, or the several parts thereof, shall take effect, and direct every such order to be registered by the registrar of each of the dioceses, whereof the bishop, or within which any cathedral or collegiate church, dignitary, chapter, member of a chapter, officer, incumbent, or any other person or body corporate, may or shall be in any respect affected thereby.[n] Orders in council confirming schemes have the force of law.

And, in any such order, it is declared to be sufficient to refer to the act, under the authority of which the order is made, and it is not necessary to recite any of the provisions of such act.

Every such order, as soon as may be after the making of it, is to be inserted in the London Gazette; and, so soon as it is so gazetted, it is in all respects, and as to all things contained in it, to have the same force and effect as an act of parliament.[o] Gazetted.

A copy of every order so made is to be laid before each House of Parliament in the month of January in every year, or, if parliament is not then sitting, within one week after the next meeting thereof.

The registrar of every diocese, to whom any such order shall be delivered, shall forthwith register the same in the registry of his diocese; and if any such registrar shall refuse or neglect to register any such order, he shall for every day during which he shall so offend, forfeit 20*l.*; and, if his offence shall continue for the space of three months, he shall forfeit his office, and it shall be lawful for the bishop of the diocese to appoint a successor thereto. For such registration the registrar shall not be entitled to receive any fee or reward, but on every search for any such order he shall be entitled to receive a fee of three shillings; and for every copy or extract of any such order certified by him, he shall be entitled to receive fourpence for every folio of ninety words; and the copy of every such entry, certified by the registrar, shall be admissible as evidence in all courts and places whatsoever.[p] Order to be registered, &c.

This power given to the commissioners of proposing and regulating schemes, which, when approved by the queen in council, have the full effect of law, (the substituting

[m] Sect. 10. [n] Sect. 12. [o] Sect. 12, 13, 14.
[p] 3 & 4 Vict. c. 113, ss. 88, 89.

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them for two of the estates of the realm in matters ecclesiastical,) is one of the two important features in their constitution: the other, to the consideration of which we now come, is, that they are a corporation for the purpose of holding an immense amount of the revenues of the Established Church, as one common fund applicable to any purpose they may think fit to propose in their schemes; unfettered by any reference to the probable intentions of the original donor; by custom or usage, however long and well established; or by any of those important restrictions to which those revenues, in the hands of their former owners, have from time immemorial been subject.

Revenues at their disposal.

We have already mentioned that it was provided upon the issuing of the first commission, that the profits and emoluments to arise from the vacant dignities and benefices, which were not to be filled up, should be paid to the treasurer of Queen Anne's Bounty, who was to keep an account, &c.; and, as to those funds, it was provided by the 3 & 4 Vict. c. 113, that the treasurer should deliver to the ecclesiastical commissioners a full and particular account of all monies received or paid by him under the former acts for that purpose, and of all things done by him, and of all proceedings then pending, and pay and deliver over to the commissioners, or to their account, all monies then remaining in his hands, exchequer bills, securities for money, books of account, &c. And that the receipt of the commissioners under their common seal should be an effectual discharge for every thing therein expressed to be received by them.[q]

Sources from which these revenues are derived.

By schemes of the ecclesiastical commissioners, confirmed by orders in council in 1837, by virtue of the 6 & 7 Will. IV. c. 77, it was ordered that the Bishop of Ely should pay annually to the ecclesiastical commissioners, by half yearly payments, the fixed sum of 2500*l.*, and that after the respective deaths of the present bishops,

Existing sees.

The see of Canterbury should pay annually .	£7300
York	1100
London	5000
Winchester	3600
Bath and Wells	1000
Worcester	2300

Such payments to be made to the ecclesiastical commissioners half-yearly; the first payment to be made in each case at the end of six months after the first avoidance of the see. And as to the emoluments of the dignities and benefices thenceforth to be suspended, it was enacted that

[q] 3 & 4 Vict. c. 113, s. 60.

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all the profits and emoluments of each and every suspended canonry, whether consisting of or arising from rents, fines, compositions, dividends, stipends, or other emoluments whatsoever, shall forthwith, as to every such canonry vacant at the passing of the act, and as to every other immediately upon and from the vacancy thereof, and from time to time, be paid to the ecclesiastical commissioners for England for the purposes of this act, in like manner as the holder of such canonry, if he had remained in possession, or the successor thereto, if a successor had been appointed, and had duly qualified himself by residence and otherwise, according to the statutes and usages of his church, to receive his full portion of the emoluments thereof, would have been entitled to receive the same; and that all the estate and interest, if any, which such successor would have had in any lands, tithes and other hereditaments (except any right of patronage), annexed or belonging to, or usually held and enjoyed with, such canonry, or whereof the rents and profits had been usually taken and enjoyed by the holder of such canonry, as such holder separately, and in addition to his share (if any) of the corporate revenues of such chapter, shall forthwith, as to all vacancies then subsisting, and as to all others immediately upon such vacancies respectively, accrue to and be vested absolutely in the ecclesiastical commissioners for England, and their successors, for the purposes of the act, without any conveyance thereof, or any assurance in the law, other than the provisions of this act: provided nevertheless that the profits and emoluments arising from corporate revenues belonging to the canonries suspended in the chapters of the cathedral churches of Chester, Lichfield, and Ripon respectively, shall become, as the vacancies occur, part of the divisible corporate revenues of the said chapters respectively: provided also that nothing therein contained should be construed to affect the right of any chapter, according to the statutes or customs of such chapter in force at the passing of the act, to make due provision out of the divisible corporate revenues for the maintenance of the fabric, the support of the grammar school, if any, and all other necessary and proper expenditure.[r] Suspended canonries.

And the estate and interest here mentioned is declared to extend to all lands and tenements (except any house within the precincts of such church belonging to any canonry, or usually held and enjoyed therewith, or any small portion of land situate within the limits and precincts of And their separate estates.

[r] 3 & 4 Vict. c. 113, s. 49.

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any cathedral or collegiate church, or in the vicinity of any residence house, which may be reserved to such church, or permanently annexed to any residentiary house by the authority of the statute 3 & 4 Vict. c. 113), tithes, or other hereditaments, endowments, and emoluments, of what nature or kind soever, which, if the last-mentioned act had not been passed, any successor to such dignity, prebend, or office, would have been entitled to possess or receive, if duly qualified in all respects, according to the statutes and usages of his church, to possess or receive the same, and if qualified and ready at all times personally and duly to perform all the duties and services of such his prebend, dignity, or office.[s]

Separate estates of remaining canonries.

But not only the emoluments of these suspended dignities, &c. but even the separate estates of those deaneries and canonries, which are not suspended, are swept into this common corporate fund; for it is enacted that all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this act, and his successors, have and would have in any lands, tithes, and other hereditaments, or endowments whatsoever, annexed, or belonging to, or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits had been usually taken and enjoyed by the holder of such deanery or canonry, as such holder separately, and in addition to his share of the corporate revenues of such chapter, shall, without any conveyance or assurance in the law, other than the provisions of this act, accrue to and be vested absolutely in the ecclesiastical commissioners.[t]

Suspended deaneries, &c.

It is further enacted, that all lands, tithes, and other hereditaments, excepting any right of patronage, and all other the emoluments and endowments whatsoever belonging to the deaneries of Wolverhapton, Middleham, Heytesbury, and Brecon, and to the dignity or office of sub-dean, chancellor of the church, vice-chancellor, treasurer, provost, precentor, or succentor, and to any prebend not residentiary in any cathedral or collegiate church in England, or in the cathedral churches of St. David's and Llandaff, or in the collegiate church of Brecon, or enjoyed by the holder of any such deanery, dignity, office, or prebend, as such holder, shall, as to all such of the said deaneries, dignities, offices and prebends respectively, as may be vacant at the time of the passing of the act, immediately upon its so passing, and as to all others immediately upon the vacancies thereof respectively, without any

[s] 4 & 5 Vict. c. 39, s. 6. [t] 3 & 4 Vict. c. 113, s. 50.

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conveyance or assurance in the law, other than the provisions of the act, accrue to and be vested absolutely in the ecclesiastical commissioners for England and their successors for the purposes of the act: provided that all other rights and privileges whatsoever now by law belonging to any of such dignities, offices, or prebends, except the last-mentioned deaneries, shall continue to belong thereto, except so far as any of such rights or privileges may be controlled or affected by any of the provisions of the act respecting the right of election now exercised by any chapter: provided that nothing therein contained shall in any manner apply to or affect any dignity, office, or prebend, which is permanently annexed to any bishopric, archdeaconry, professorship, or lectureship, or to any school, or the mastership thereof, or the prebend of Burgham, Bursalis, Exceit, and Wyndham, in the cathedral church of Chichester.[u]

Sinecure rectories.

And also that upon the suppression of any ecclesiastical rectory without cure of souls, all the estate and interest which the rector thereof, or his successor, has or had, or would have or have had in any lands, tithes, or other hereditaments whatsoever, shall, without any conveyance thereof, or any assurance in the law other than the provisions of the act, accrue to and be vested in the ecclesiastical commissioners.[x]

Revenues vested in the commissioners.

As to the whole of this corporate fund, it is enacted that the ecclesiastical commissioners shall for the purpose of enforcing payment of all profits and emoluments to be paid to them, and of obtaining possession of all lands, tithes, or other hereditaments vested in or accruing to them, and of recovering the rents and profits thereof, have and enjoy all rights, powers and remedies at law and in equity, which belonged, or belong, or would belong, or have belonged to the holder of the deanery, canonry, prebend, dignity, or office, or the rector of the rectory, in respect of which such profits, &c., are by the provisons of the act to be paid, or to accrue to, and be vested in the commissioners.[y]

The commissioners, in respect of all lands, tithes, tenements, or other hereditaments already vested or liable to be vested in them, shall be deemed to be the owners or joint-owners thereof respectively, as the case may be, for all the purposes of the several acts for the commutation of tithes.

Application of these revenues.

Having now seen from what sources and in what manner this large corporate fund in the hands of the commissioners

[u] 3 & 4 Vict. c. 113, s. 61. [x] Ibid. s. 54. [y] Sect. 57.

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has been or is to be acquired, it remains to be seen in what manner, and subject to what restrictions, it is to be applied and disposed of.

Special payments.

Certain special payments are, in the first place, either directed or allowed to be made by the commissioners out of the fund thus at their disposal. The various provisions for archdeaconries will be found mentioned in their proper place: and in any cathedral church on the old foundation in which any contribution to the fabric fund of such church has heretofore, either usually or occasionally, been made out of the rents or proceeds of any lands, tithes, or other hereditaments, so to be vested in the ecclesiastical commissioners, it shall be lawful for the commissioners to contribute to such fund such sum as they shall deem necessary, out of the rents or proceeds of the same lands, tithes, or other hereditaments, not exceeding in amount the proportion of such rents, &c. which has usually been applied to the like purposes.[z] The commissioners are also allowed, out of the fund, to pay all necessary law charges, and to make allowance for costs, charges, expenses and trouble to any person employed by them in receiving or paying money, auditing accounts, surveying, valuing, &c. or performing any duty connected with what they are empowered to do. Subject to these special deductions, the fund may be considered as divisible into two parts: first, the *episcopal fund*, formed by fixed contributions from the larger bishoprics, out of which fixed annual payments are made in augmentation of the incomes of the smaller; and secondly, *a common fund*, applicable to the augmentation of poor livings, endowments of new churches, employment of additional ministers, &c.[a]

Fund divided into two parts.

For the increased efficiency of the Established Church.

For it is enacted that, with the exception of the special applications before alluded to, all the monies and revenues to be paid to the commissioners, and all the rents and profits of the lands, &c. vested, and to be vested in them, together with all accumulations of interest produced by and arising therefrom, shall be from time to time carried over to a common fund, and by payments or investments made out of such fund; or if in any case it be deemed more expedient, by means of an actual conveyance and assignment of such lands, tithes, or other hereditaments, or of a portion thereof, additional provision shall be made for the cure of souls in parishes where such assistance is most required, in such manner as shall, by the

[z] Sect. 53.

[a] See sect. 67; circular issued by order of the commissioners in 1844; and see post, book iii. chap. i.

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authority of the commissioners, be deemed most conducive to the efficiency of the Established Church: provided that in making any such additional provision out of any tithes, or any lands, or other hereditaments allotted or assigned in lieu of tithes so vested in the commissioners, or out of the rents and profits thereof, due consideration shall be had of the wants and circumstances of the places in which such tithes now arise or have heretofore arisen.[b]

Commissioners to borrow of Queen Anne's Bounty.

But, as a considerable time might have elapsed before the commissioners, under the above provisions, might have acquired a sufficient disposable fund, it has been enacted that the commissioners shall forthwith borrow, and the governor of Queen Anne's Bounty with the Archbishop of Canterbury shall forthwith lend, the sum of £600,000, three per cent., part of a sum standing in their names: and the commissioners are further empowered to borrow, and the governors of Queen Anne's bounty are further empowered to lend, if they think fit, any further sums of stock. Upon the transfer of any such stock into their names in the books of the governor and company of the Bank of England, the commissioners are to pay to the governors, by half-yearly payments, on the 10th of April and the 14th of October in each year, a sum equal to the amount of the dividends which such stock, or so much thereof as shall on such days respectively remain unreplaced, would produce; the commissioners being at any time allowed to replace the whole or any part of such stock.[c]

Provisions for security and for repayment of this loan.

All monies in the hands of the commissioners, and all the lands, tithes, and other hereditaments, which, under the provisions mentioned above, are in any way vested in the commissioners, are charged with and made a security for such half-yearly payments, and for the repayment and replacing the whole of the capital stock so lent: and the governors, upon proof of default being made, are to have all such remedies as they would have had, if the commissioners had duly executed a deed under their common seal, covenanting for such repayment.[d]

After the expiration of thirty years from the date of the lending such sum, or after the expiration of a like number of years from the date of lending such further sum, the governors may give notice in writing to the commissioners, requiring them to replace the sum borrowed; upon which the commissioners are to proceed to replace the sum by yearly instalments, amounting at least to one-twelfth part of such sums of stock respectively; and, in default of their

[b] Sect. 67. [c] 6 & 7 Vict. c. 37, ss. 1, 2, 3. [d] Sect. 4.

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so doing, the governors are to have their remedy in the same manner as for the half-yearly payment.[e]

Commissioners to have rights of ownership notwithstanding in the lands vested in them.

Notwithstanding the charge thus created, the commissioners are to exercise all the full rights of ownership over all money and all property vested in them under any of the provisions mentioned above, the consent of the governors not being necessary to the exercise of any of their rights and powers; but every sum of money received as the consideration or purchase-money for the sale, transfer, or conveyance by the commissioners of any of such lands, tithes, tenements, or other hereditaments, or of any estate or interest therein, and also every sum of money received by them as the fine for the granting or renewing of any lease, shall, unless it be deemed expedient by the commissioners to apply any such sum, or any part thereof, in replacing any stock so lent and transferred as aforesaid, which they are empowered to do, be applied by them, so soon as conveniently may be after the receipt thereof, in the purchase of lands, tithes, rent-charges, tenements, or other hereditaments, or of some estate or interest therein, and shall in the meantime be invested in some government or parliamentary stock, or other public securities in England, the commissioners being at liberty to apply the interest and dividends of such stock or securities, &c.[f]

But no part of the capital of such stock shall be so applied, nor shall any such lands, tithes, tenements, or other hereditaments, be sold, transferred, or conveyed, except by the authority of a scheme prepared by the commissioners, and an order in council ratifying such scheme.[g]

The several arrangements and rules for the application of this fund,[h] and the various other occasions in which the authority of the ecclesiastical commissioners is required, either by direct interference, or indirectly by their sanction, will be found in other parts of this work. And it will be remembered, that in every case in which the authority of the ecclesiastical commissioners is mentioned, the authority of a scheme proposed by them and confirmed by an order in council is to be understood.[i]

Meaning of the "authority of the commissioners."

[e] Sect. 5. [f] Sect. 6, 7. [g] Sect. 8. [h] See post, Book 3, Chap. 1.

[i] It will be seen from this chapter, that the powers and authorities hitherto conferred upon the ecclesiastical commissioners are in respect of ecclesiastical property, and in the allotment of ecclesiastical revenues only, in which cases parliament has in effect delegated to them its authority. It appears to be well worthy of consideration, whether a similar power might not also be delegated to them of making regulations, which, when confirmed by order in council, should be binding on the clergy generally in matters of ecclesiastical discipline, and the observance of forms, rites, habits, &c. Some such power of making regulations in these matters, as was formerly exercised, or attempted to be exercised by the convocation, is required to be vested somewhere. The houses of par-

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CHAPTER VI.

OF THE POWERS, PRIVILEGES AND RESTRICTIONS OF ECCLESIASTICAL PERSONS GENERALLY.

Ancient privileges of the clergy.

THIS venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the service of Almighty God, have thereupon large privileges allowed them by our municipal laws; and had formerly much greater, which were abridged at the time of the Reformation, on account of the ill use which the popish clergy had endeavoured to make of them. For the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by Sir Edward Coke,[a] that as the overflowing of waters doth many times make the river to lose its proper channel, so in times past, ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them.[b]

Era of their greatest power.

The power and extended privileges of the clergy alluded to by Blackstone in the above sentence, appear to have attained their greatest height about the twelfth century of our era. At that time they had acquired extensive jurisdiction in temporal as well as ecclesiastical matters, the greater number of causes of every kind being then referable to their tribunals.[c]

Origin of the legal power and juriadiction of ecclesiastics.

The arbitrative authority of ecclesiastical pastors, if not coeval with Christianity, grew up very early in the Church, and was natural, or even necessary, to an insulated and persecuted society.[d] Accustomed to feel a strong aversion to the imperial tribunals, and even to consider a recurrence to them as hardly consistent with their professions, the early Christians retained somewhat of a similar prejudice even after the establishment of their religion. The arbitration of their bishop still seemed a less objectionable mode of settling differences; and this arbitrative jurisdiction was powerfully supported by a law of Constantine,

liament are certainly unfitted for the purpose; and the ecclesiastical commission, composed as it is of all the bishops and archbishops, of the most eminent of the judges, and of the most responsible ministers of the crown, would appear to be precisely such a tribunal as might be safely trusted with this authority.

[a] 2 Inst. 4.

[b] 1 Black. Com. 376.

[c] See Hallam's Middle Ages.

[d] See 1 Corinthians, chap. 6, the first seven verses. The passage seems an authority for our proposition.

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which directed the civil magistrate to enforce the execution of episcopal awards. Another edict, ascribed to the same emperor, and annexed to the Theodosian code, extended the jurisdiction of the bishops to all causes which either party chose to refer to it, even where they had already commenced their suit in a secular court, and declared the bishop's sentence not subject to appeal. This edict, although subsequently acted upon, is said to have been clearly proved to be a forgery.[e]

Especially in causes where any of their body were concerned.

If it was considered almost as a general obligation upon the primitive Christians to decide their civil disputes by internal arbitration, much more would this be incumbent upon the clergy. The canons of several councils, in the fourth and fifth centuries, sentence a bishop or priest to deposition who should bring any suit, civil or even criminal, before a secular magistrate. This must, it should appear, be confined to causes where the defendant was a clerk, since the Ecclesiastical Court had hitherto no coercive jurisdiction over the laity. It was not so easy to induce laymen, in their suits against clerks, to prefer the episcopal tribunal. The emperors were not at all disposed to favour this species of encroachment till the reign of Justinian, who ordered civil suits against ecclesiastics to be carried only before the bishops; yet this was accompanied by a provision, that a party dissatisfied with the sentence might apply to the secular magistrate, not as an appellant, but as a co-ordinate jurisdiction; for if different judgments were given in the two courts, the process was ultimately referred to the emperor.[f]

From the character of the cause or crime.

But again, the character of a cause, as well as of the parties engaged, might bring it within the limits of ecclesiastical jurisdiction. In all questions simply religious, the Church had an original right of decision;[g] but, under some pretence, many temporal causes also were considered as falling within its jurisdiction; for, according to the interpretation of those times, the Church was bound to prevent and chastise the commission of sin. Thus the differences of individuals, which often involve some charge of wilful injury, fell into their hands: cases of breaches of contract where an oath had been pledged. They also took into their hands the execution of testaments, on account of the legacies to pious uses, which testators were advised to bequeath: a jurisdiction which they have ever since retained. Perjury, sacrilege, usury, incest and adultery, and offences of a criminal nature, they had such

[e] See 2 Hallam's Middle Ages, 211.
[f] Ibid.; and Fleury, Hist. Eccles. t. vii. p. 292.
[g] Lex Arcadii et Honorii, apud Mem. de l'Académie, t. 39, p. 574.

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complete jurisdiction over, that the secular magistrates usually refrained from the punishment of them.[h]

Other powers of the clergy.

But the clergy possessed besides more direct means of acquiring temporal power. They were entitled to the privilege of assisting in the deliberative assemblies of the nation. Councils of bishops, such as had been convoked by Constantine and his successors, were limited in their functions to decisions of faith, or canons of ecclesiastical discipline. But the northern nations did not so well preserve the distinction between secular and spiritual legislation. The laity seldom, perhaps, gave their suffrage to the canons of the Church; but the Church was not so scrupulous as to trespassing upon the province of the laity. Many provisions are found in the canons of national and even provincial councils, which relate to the temporal constitution of the state. Thus one held at Calcluith (an unknown place in England) in 787, enacted that none but legitimate princes should be raised to the throne, and not such as were engendered in adultery or incest.[i]

Benefit of clergy.

Into these questions of historical rather than of legal interest, the limits of our present work will not permit us to enter more fully; but there is one other of the former privileges of the clergy, which is too important not to be particularly mentioned, and which at one time had reached to such a point as almost to render impossible the administration of temporal justice. This privilege, which, as Dr. Burn observes, one would almost imagine to be calculated to bring disgrace upon the order, rather than to confer any real benefit upon it, was in fact little else than immunity from the punishments which, in every organized society, even in its rudest form, are appointed for certain crimes.

Origin of.

The privilege has been called benefit of clergy, and had its origin in an old constitution of the pope, that no man should accuse the priests of holy church before a secular judge; and it is said to have been founded on the text "Touch not mine anointed, and do my prophets no harm." And if it had been thus limited, and the Church had been prepared to inflict due punishment on her ministers, such a privilege, in the ruder ages, would appear not unreasonable; and, as Mr. Barrington observes, we are not to judge of the propriety of the benefit of clergy by the present state of the country; and he points out that, while

Propriety of, in its origin.

[h] See Hallam's Middle Ages, chap. 7.

[i] Ibid., where the powers mentioned in the text will be found very fully discussed.

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it was confined in its objects to actual priests, the inconvenience was far less than is commonly supposed; because such crimes only were within the benefit as the munificently provided priesthood had little temptation to commit;[k] and besides, by the forfeiture of goods, which attended the pleading this privilege, and by the power of forbidding purgation, the courts were able, in most cases, to impose a punishment adequate to the offence.

Confirmed by statute.

Lord Coke observes,[l] that this constitution of the pope, being contrary to the common law, and to the dignity of the crown, did not bind here until it was confirmed by act of parliament in the 3rd year of Edward I., when it was enacted that when a clerk is taken for guilty of felony, and is demanded by the ordinary, he shall be delivered to him, according to the privilege of holy church. And they which be indicted of such offences by solemn inquest of lawful men in the king's court, shall in no manner be delivered without due purgation.[m]

But although the constitution might not have been legally binding before that time, there can be little doubt but that the privilege was allowed in this country long before, and that the statute was an affirmance of the custom.

To whom and to what crimes afterwards extended.

Originally the law was held that no man should be admitted to the privilege of clergy but such as had the *habitum et tonsuram clericalem;* but then, in order to swell the list of their subjects and adherents, the bishops gave the tonsure indiscriminately; which sign of a clerical state, though below the lowest of their seven degrees of ordination, implying no spiritual office, conferred the privileges and immunities of the profession on all who wore an ecclesiastical habit, and had only once been married. Orphans and widows, the stranger and the poor, the pilgrim and the leper, under the appellation of persons in distress (*miserabiles personæ*), came within the peculiar cognizance and protection of the church: nor could they be sued before any lay tribunal. And the whole body of crusaders, or such as merely took the vow of engaging in a crusade, enjoyed the same clerical privileges.[n]

Blackstone says, the clergy increasing in wealth, power, honour, number and interest, began soon to set up for themselves; and that which they obtained by the favour of the civil government, they now claimed as their inherent right, and as a right of the highest nature, indefea-

[k] 4 Black. Com. 369, n. in Coleridge's edit.
[l] 2 Inst. 636. [m] 3 Edw. 1, c. 2.
[n] Hallam's Middle Ages, chap. 7, and see authorities there mentioned.

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sible and *jure divino*. By their canons, therefore, and constitutions they endeavoured at, and where they met with easy princes obtained, a vast extension of these exemptions, as well in regard to the crimes themselves, of which the list became quite universal, as in regard to the persons exempted, among whom were at length comprehended, not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

To all who could read.

But even this wide interpretation was not deemed sufficiently comprehensive: in process of time a much wider and more comprehensive criterion was established; every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders nor trimmed with the clerical tonsure.[o]

If claimed by the bishop.

And, if any man that could so read were condemned to death, the bishop of the diocese might, if he chose, claim him as a clerk; and he was to see him tried in the face of the court whether he could read or not: the book was prepared and brought by the bishop, and the judge was to turn to some place as he should choose, and if the prisoner could read, then the bishop was to have him delivered over unto him, to dispose of in some places of the clergy, as he should think meet; but if either the bishop would not demand him, or the prisoner could not read, then was he to be put to death.[p]

Distinction afterwards made between learned laymen and clerks in orders.

But when learning, by means of the invention of printing and other concurrent causes, began to be more generally disseminated than formerly, and reading was no longer a competent proof of clerkship or being in holy orders, it was found that as many laymen as divines were admitted to the *privilegium clericale*; and therefore, by statute 4 Hen. VIII. c. 13, a distinction was once more drawn between mere lay scholars and clerks that were really in orders. And though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy, being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs, that no person once admitted to the benefit of clergy shall be admitted thereto a second time unless he produces his orders; and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the

Proceedings when clergy was pleaded.

[o] 4 Black. Com. 365, 366.

[p] Bacon's Use of the Law, 122.

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brawn of the left thumb. This distinction between learned laymen and real clerks in orders was abolished for a time by the statutes 28 Hen. VIII. c. 1, and 32 Hen. VIII. c. 3; but it is held[q] to have been virtually restored by statute 1 Edw. VI. c. 12, which statute also enacts that the lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage[r] equivalent to that of clergy, for the first offence (although they cannot read, and without being burnt in the hand), for all offences then clergyable to commoners, and also for the crimes of housebreaking, highway robbery, horse stealing, and robbing of churches.[s]

Proceedings by the ecclesiastical tribunal.

After this burning, the laity, and before it the real clergy, were discharged from the sentence of the law in the king's court, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial, although he had been previously convicted by his country, or perhaps by his own confession. This trial was held before the bishop in person, or his deputy, and by a jury of twelve clerks; and there, first, the party himself

Purgation.

was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then witnesses were to be examined upon oath, but on behalf of the prisoner only; and lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded or put to penance.[t] Lord Hobart remarks, that the witnesses in this sort of mock trial, and likewise the compurgators, who were upon their oaths *de credulitate*, and also the jury, all had their share in these perjuries; and he further observes, that the

And consequent perjury.

judge himself was not quite clear. Such a solemn farce, as it has been rightly called, gave rise of necessity to the most complicated perjury; and a statute was therefore passed in the reign of Queen Elizabeth, by which it was enacted that for the avoiding of such perjuries and abuses,

Purgation abolished.

after the offender has been allowed his clergy, he shall not be delivered to the ordinary as formerly; but, upon such allowance, and burning in the hand, he shall forth-

[q] Hob. 294; 2 Hale, P. C. 375.
[r] See Duchess of Kingston's case, 11 State Trials, 262.
[s] 4 Black. Com. 367.
[t] See the case of *Rex* v. *Burridge*, 3 P. Wms. where the subject is fully considered.

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with be enlarged and delivered out of prison, with proviso that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year.[u]

Thus much of benefit of clergy, as it arose from and was considered a privilege of the order. Other later statutes have been passed for regulating this benefit of clergy, which it does not appear necessary here to mention, since the benefit of clergy is now entirely abolished;[x] and from what has been already said, it will be seen that for many years previously to its abolition it had ceased to be a peculiar privilege of the clergy in our present acceptation of that word; and, as Mr. Justice Foster remarks, it might have been rather termed a benefit of the statutes, or a relaxation of the rigour of the criminal law, and a condescension to the infirmities of human nature. The various statutes, therefore, by which it was regulated in later times, would be therefore rather matter of criminal than of ecclesiastical law.

Abolition of the privilege.

Mr. Justice Blackstone, after mentioning the origin of this extraordinary privilege, and giving a history of its progress and gradual decline, concludes with the following observation: "From the whole of this detail we may collect, that however in times of ignorance and superstition, that monster in true policy may for awhile subsist, of a body of men, residing in the bowels of a state, and yet independent of its laws; yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross as must destroy its very fundamentals. For, by the original contract of government, the price of protection, by the united force of individuals, is that of obedience to the united will of the community. This united will is declared in the laws of the land, and that united force is exerted in their due and universal execution."[y]

The privileges and exemptions of the clergy were formerly not only personal, but extended to their ecclesiastical goods, so that their tithes and glebe lands were not subject to rates, nor liable to contribute towards any of those public charges, for which rates are usually imposed; but this does not appear to have been the case in this country always; for among the Saxons, it is said, the lands of the clergy were charged to castles, bridges and reparations.

Privileges formerly extended to the goods, &c. of ecclesiastics.

These exemptions, however, exist no longer; and the only privileges of ecclesiastical persons at the present day are personal: thus, generally, they are neither bound to accept, though, on the other hand, they are not restrained

Exempt from serving in certain temporal offices.

[u] 18 Eliz. c. 7. [x] 7 & 8 Geo. 4, c. 28. [y] 4 Black. Com. 372.

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from serving in temporal offices, such as bailiff, reeve, constable, or the like; and this in regard of their continual attendance on the sacred function; nor will it make any difference, although the office be such as they might exercise by deputy.[z]

Acting as justices.

By a constitution of Othobon, the clergy are prohibited from acting as justices, which is, in the constitution, absurdly enough termed a horrid vice, which is to be extirpated. There is, however, contained in it a saving of the privileges of the king,[a] which saving, it has been observed, entirely defeats the constitution; but if that saving had not been expressed, yet it is certain that the constitution could not have altered the law of the land in this respect. And it is well known that the kings of England in all ages have asserted a right to employ what subjects they pleased, of the clergy as well as laity, in any post of civil government.

Exemptions from certain offices.

They are not bound to serve in war, nor to appear at a court leet or view of frankpledge; neither can they be compelled to serve on a jury;[b] yet that they are not prohibited from so serving, appears rather from this, that it is said if a layman be summoned on a jury, and before the trial takes orders, he shall nevertheless appear and be sworn.[c]

Privilege from arrest.

They are also privileged from arrest in civil suits during their attendance on divine service;[d] that is, as it has been adjudged, in going to, continuing at, and in returning from, the celebration of divine service.[e] And they are in like manner privileged while carrying the sacrament to any sick persons; and this seems to be extended to the clerks who are with them.

How far it extends.

But it must be observed, that this is in the case of civil suits only; and they are not protected from being arrested at such times by warrant duly issued against them, in case of an alleged or suspected crime.[f]

Pitt had a warrant from a justice of the peace, and served it upon Webley, as he was coming from church from sermon, upon a week day. Whereupon Webley libelled against him in the Spiritual Court; and Pitt moved for a prohibition, and framed the suggestion upon these statutes, which prohibit arrests in time of divine service, and in going and returning to and from the church. But it was said that those statutes are where the matters are betwixt one common person and another, but not where it

[z] 1 Inst. 96; 3 Burn's E. L. 197.
[a] Athon. 89; 3 Burn's E. L. 195.
[b] 2 Inst. 3, 4.
[c] *Beecher's case*, 4 Leon. 190.
[d] 1 Black. Com. 377; stat. 50 Edw. 3, c. 5.
[e] 12 Co. 100; 2 Buls. 72.
[f] Cro. Jac. 321.

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concerns the king and a common person, as here it did, this arrest being made at the king's suit. And to this opinion the court seemed to incline, and that there was just cause for a prohibition.[g]

Ecclesiastical persons cannot sit in the House of Commons.

No person, who has been ordained to the office of priest or deacon, nor any minister of the Church of Scotland, is capable of being elected to serve in parliament as a member of the House of Commons; and if any person so ordained shall at any time be elected, such election is void. And if any person, being a member of the House, shall be so ordained, or become a minister of the Church of Scotland, his seat becomes instantly *ipso facto* void. And if, in either of such cases, he presumes to sit or vote as a member of the House of Commons, he is liable to forfeit the sum of 500*l.* to the party suing, for every day in which he has so sat or voted. And he is, moreover, thenceforth incapable of taking, holding or enjoying, any benefice, living, or promotion ecclesiastical whatsoever, or any office of honour or profit under the crown.[h]

Restricted as to trading or farming.

By a statute passed at the time of the Reformation, and by another in the latter part of the reign of George III., ecclesiastical persons were restrained from trading, and from taking farms of more than a certain value; but these statutes have been now repealed; and by a recent act[i] those restrictions, and the penalties for disobeying them, are fixed as follows:—

Not to take farms of above eighty acres, without consent of the bishop.

No spiritual person, holding any cathedral preferment or benefice, or any curacy or lectureship, or who shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, may take to farm, for occupation by himself, by lease, grant, words, or otherwise, for term of life or of years, or at will, any lands exceeding eighty acres in the whole, for the purpose of cultivating the same, without the permission in writing of the bishop of the diocese, specially given for that purpose, under his hand, and every such permission to any spiritual person to take to farm, for the purpose aforesaid, any greater quantity of land than eighty acres, shall specify the number of years, not exceeding seven, for which such permission is given; and every such spiritual person, who, without such permission, shall take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above eighty acres forty shillings for each year during which he shall occupy the same.[k]

Not to engage in trade, &c.

And no such spiritual person as before mentioned, by

[g] Cro. Jac. 321.
[h] 41 Geo. 3, c. 63.
[i] 1 & 2 Vict. c. 106.
[k] Sect. 28.

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himself, or by any other for him, may engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares or merchandise, unless it shall be on behalf of any number of partners exceeding six, or in a case where any such trade or dealing shall have devolved upon any spiritual person, or upon any person for his use, by virtue of any devise, bequest, inheritance, intestacy, settlement, marriage, bankruptcy or insolvency.[l]

In none of which excepted cases, however, is it lawful for such spiritual person to act as director or managing partner, or to carry on the business in person.[l]

Certain cases excepted.

These restrictions, however, do not extend to the case of spiritual persons engaged in keeping schools, or in any manner employed in giving instruction or education, so as to prevent them from buying or selliug, or doing any other thing in the course of such management or employment; nor to selling any thing bought *bonâ fide* for the use of the family; nor to selling any books to a bookseller or publisher; nor to being managers or directors in any benefit, fire or life insurance company; or to buying or selling cattle for the use of their own lands; but so, nevertheless, that no such spiritual person shall buy or sell any cattle or corn, or other articles as aforesaid, in person, in any market, fair, or place of public sale.[m] And all spiritual persons so trading illegally may be suspended for the first offence for any time not exceeding one year; for the second offence, may be suspended for such time as the judge shall think fit; and for the third offence, shall be deprived *ab officio et beneficio*.[n]

Punishment for illegal trading, &c.

[l] Sect. 29. [m] Sect. 30.
[n] Sect. 31. See Chapter on Suspension and Deprivation, &c.

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CHAPTER VII.

OF THE RIGHTS, PRIVILEGES AND DUTIES, OF ECCLESIASTICAL PERSONS SEPARATELY.

England how divided for ecclesiastical purposes.

We now come to speak of the several ranks and degrees in the frame and constitution of our ecclesiastical polity. For as this country is divided into various ecclesiastical districts, of which each minor division is a part of and included in a larger,[a] so over each of these districts there presides some spiritual governor, who, in each minor district, is subordinate in a corresponding manner to the president of the larger division. Thus England is ecclesiastically divided into provinces—each province into dioceses—each diocese into archdeaconries—each archdeaconry into deaneries—and each deanery into parishes, towns and hamlets, or district parishes. Of these several divisions, the respective governors are — the king, archbishops, bishops, archdeacons, rural deans, rectors, vicars or perpetual curates, and stipendiary curates; but, besides these, there are some other ranks and offices which will be also mentioned in their order. Of the king, and of his supremacy over the whole ecclesiastical body, we have already spoken: of the rest, we shall here mention the manner of their appointment, the rights, privileges and duties incident to their office, and the manner in which that office may determine.

SECTION I.

Of Archbishops and Bishops.

The word bishop, in the Saxon biscop, is the Greek ἐπίσκοπος, overseer or superintendent, so called, it has been said, from that watchfulness, charge, care and faithfulness, which by his place and dignity he hath and oweth to the Church.[b]

Archbishoprics.

The bishops and all the inferior clergy in each province are subject to an archbishop, who, next and immediately under the king, has supreme jurisdiction and authority in all causes and things ecclesiastical. Of these provinces, there are two in England and Wales, which, for ecclesiastical purposes therefore, is thus divided: such are those of Canterbury and York; and formerly there existed a third, that of Caerleon, in South Wales; but, in the time of Henry I., both that see, and all Wales, became subject

[a] See post, Book III. Chap. I.

[b] Godolph. 22.

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Dioceses of each province.

to the Archbishop of Canterbury.[c] Each archbishop hath within his province bishops of several dioceses. The Archbishop of Canterbury hath under him within his province, of ancient foundations, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Coventry and Lichfield, Hereford, Llandaff, St. David, Bangor, and St. Asaph; and three founded by King Henry VIII., erected out of the ruins of dissolved monasteries, viz. Gloucester and Bristol, which were formerly distinct dioceses; Peterborough, and Oxford. The Archbishop of York hath under him five, viz. Chester, erected by King Henry VIII., and annexed by him to the Archbishopric of York, Durham, Carlisle; the Isle of Man, annexed to the Province of York, by King Henry VIII.; and the newly erected diocese of Ripon; the Province of York also occasionally claimed and had a metropolitan jurisdiction over all the bishops of Scotland, until about the year 1466, when those bishops withdrew themselves from obedience to him, and, in the year 1470, the Bishop of St. Andrews was, by the pope, created archbishop and metropolitan of all Scotland.[d]

Archbishop, election of.

The election of an archbishop does not differ from that of the election of bishops, which we shall afterwards have to notice. But the election must be signified to the other archbishop, and to two bishops; or if not to the archbishop, then to four bishops, requiring them to confirm, elect and consecrate him, which they are bound to perform immediately, without any application to the see of Rome;[e] the last application of that nature having been made by Henry VIII. on behalf of Archbishop Cranmer.[f]

Of Canterbury, how styled, &c.

The Archbishop of Canterbury is styled metropolitan or primate; and, when he is vested in the archbishopric, is said to be enthroned; he writes himself by Divine Providence; and has also the title of Grace, and Most Reverend Father in God; and he may retain and qualify eight chaplains.[g]

His prerogatives and dignity.

As archbishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation, but without the king's writ he cannot assemble them. To him all appeals are made from inferior jurisdictions within his province; and as an appeal lies from

[c] Rogers's E. L. 105.
[d] Co. Litt. 94 a.; 1 Burn's E. L. 195; st. 33 Hen. 8, c. 31; 6 & 7 Will. 4, c. 77.
[e] 1 Black. 378. [f] Hallam's Const. Hist.
[g] Godolph. 21; 1 Burn's E. L. 198.

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each bishop of his province in person to him in person, so it also lies from the Consistory Courts of each diocese to his Archiepiscopal Court. During the vacancy of any see in his province, he is guardian of the spiritualties thereof, as the king is of the temporalties, and he executes all ecclesiastical jurisdiction therein.[h]

The Archbishop of Canterbury is, for some purposes, superior to the other archbishop. He is styled Primate and Metropolitan of all England, notwithstanding there is in England another archiepiscopal province; and for this, among other reasons, that he has by stat. 25 Henry VIII. c. 21, the power of granting dispensations in any case not contrary to the Holy Scriptures and the law of God, where the pope used formerly to grant them in both provinces alike; and this too is the foundation of his granting special licenses to marry at any place or time; to hold two livings and the like; and on this also is founded the right he exercises of conferring degrees in prejudice of the two Universities.[i]

Among the privileges of this archbishop may be considered that, by custom, of crowning the sovereign of this kingdom, whether kings or queens, and that of having prelates to be his officers. Thus the Bishop of London is his provincial dean; the Bishop of Winchester his chancellor; the Bishop of Lincoln anciently was his vice-chancellor; the Bishop of Salisbury his precentor; the Bishop of Worcester his chaplain; and the Bishop of Rochester, in former times, carried the cross before him. He is the first peer of the realm, and hath precedency not only before all the other clergy, but next and immediately after the blood royal, before all the nobility of the realm, and before all the great officers of state. And by statute 31 Henry VIII. c. 10, the Archbishop of Canterbury is directed to sit in parliament, on the right side of the parliament chamber, first before the Archbishop of York and all the other bishops.[k]

Of York.

The Archbishop of York has, by custom, the privilege to crown the queen consort, and to be her perpetual chaplain; and he has precedency before all dukes, not being of the blood royal, and of all the great officers of state, except the lord chancellor. And by the statute 31 Henry VIII., c. 10, before mentioned, he is directed to sit in parliament next to the Archbishop of Canterbury.[l]

Archbishops generally.

The archbishop is superintendent throughout his whole

[h] 1 Black. Comm. 380.
[i] Ibid.; and see Christian's note to 1 Black. Comm. 378.
[k] Godolph. 14, &c. [l] Ibid.

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province of all ecclesiastical matters, to correct and supply the defects of other bishops, so that, for many purposes,

Duties of.

he has concurrent jurisdiction with them; and therefore his ecclesiastical acts done within his province are voidable only, and not void, though done where the jurisdiction belonged to a bishop or other ecclesiastical person within his province; as if he were to grant administration where there were not *bona notabilia*. So he hath provincial power over all bishops in his province, may hold a court when he pleases therein, may officiate as judge in person or by vicar-general; may deprive them or convene them before him, for misdemeanor in their function.[m]

Visitation by.

If the archbishop visit his inferior bishop, and inhibit him during the visitation, and the bishop have a title to collate to a benefice within his diocese by reason of lapse, yet the bishop cannot institute his clerk, but the clerk ought to be presented to the archbishop, and the archbishop is to institute him, by reason, that during the inhibition, the bishop's power of jurisdiction is suspended.[n]

Appeals to.

The jurisdiction of the archbishop on appeals in different ecclesiastical matters has been very considerably increased by various recent statutes, and, as we shall have to remark in the case of bishops, not only has greater power been given him, but, in some cases, other modes of proceeding in the common law courts have been either directly or indirectly superseded;[o] and the Church has thus undoubtedly acquired an increased authority in church matters. This will be found mentioned more particularly under other heads, as those of Church Discipline, Residence, Pluralities, Curates, Offences against Religion, &c.

The manner in which the decisions, &c. of the bishop are liable to be reviewed in almost every case by the archbishop will be repeatedly mentioned hereafter.

Secular authority of, how transferred.

Besides his ordinary jurisdiction as bishop, the Archbishop of York had formerly a secular authority also in certain parts of his diocese, but by an act of parliament passed in the year 1836, it was enacted, that all his secular authority in the different places in which it had been formerly exercised should cease and determine, and should be transferred to and vested in the king.[p]

Annual charge on archbishoprics.

By an order in council confirming the recommendation of the ecclesiastical commissioners, the see of Canterbury

[m] 1 Burn's E. L. 230; *Bishop of St. David's case*, Carth. 485; 1 Ld. Ray. Rep. 447, 539.

[n] Godolph. 19.

[o] See post, Salaries of Curates.

[p] 6 & 7 Will. 4, c. 87.

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is to pay annually to the commissioners towards the augmentation of the incomes of the small bishoprics 7300*l.*, and the see of York 1100*l.*, and the sums are to be paid by half-yearly payments. But this order does not affect the present possessors; so that the first of such payments will have to be made at the end of six months from the day of the avoidance of the see.[q]

Right of archbishop to present by lapse.

The archbishop is entitled to present by lapse to all ecclesiastical livings in the disposal of his diocesan bishops, if not filled up within six months.[r]

Options.

But the archbishop has a further customary prerogative as to livings in the disposal of his diocesan bishops, which is far more valuable than this of presenting by lapse; for every bishop, whether created or translated, is bound, immediately after confirmation, to make a legal conveyance to the archbishop of the next avoidance of one such dignity or benefice belonging to his see, as the said archbishop shall choose and name, which is therefore commonly called an option. Of this we find early mention in the records of the see of Canterbury, among the presentations, institutions and collations of the archbishops, but with these two variations, that in some places it is said to be due *ratione consecrationis;* and that anciently the person to be promoted was named to the bishop, and not the dignity or benefice he was to be promoted to.[s]

Ancient kinds of.

The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury. And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative, called *primæ*, or *primariæ preces;* whereby the emperor exercises, and hath immemorially exercised, a right of naming to the first prebend that becomes vacant after his accession, in every church in the empire. A right that was also exercised by the crown of England in the reign of Edward I.[t]

And the ancient and immemorial usage is by Gibson stated to have been for the archbishop to name a fit clerk for whom the new bishop was to provide, *quam primum facultas se obtulerit*, as soon as he could, and to assign him a pension in the meantime.

Present custom as to.

This practice was changed to the present, at the time of the Reformation, by Archbishop Cranmer; from whose time it is said to have been the constant usage to convey the advowson, either of the first dignity or benefice that

[q] Order in Council, gazetted 18th July, 1838.
[r] 1 Black. Com. 380.
[s] Gibs. 115.
[t] Sherlock on Options; 1 Black. Comm. 380.

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should fall, or of some one in particular, to the archbishop, his executors and assigns, at first for twenty-one years, and afterwards for the next avoidance;[u] and the custom appears now to be established, of conveying such one particular benefice belonging to the see as the archbishop shall choose.

Are considered as personal property.

These options, when conveyed to the archbishop, are to all purposes considered as chattels, and his personal property. He may bequeath them by his will; and, if he does not bequeath them, they pass to his executor or administrator. They are not considered as belonging to the see, and seizable by the king amongst the other temporalties belonging to it.[x]

If the archbishop die whilst the bishop granting the option continues in his see, the option goes to the executor or administrator of the archbishop, to be disposed of as the archbishop may by will direct; and although it is said they may not be assets for the payment of his debts, yet it is said by Gaselee, J., in giving judgment in the Common Pleas, in the case of *Rennell* against *The Bishop of Lincoln*, "If a creditor should take out administration, what is there to prevent the administrator from selling the options before the vacancies happen; or indeed, in a common case, to prevent a residuary legatee, or one of the next of kin from calling upon the executor or administrator to do so." And this circumstance, that options are transmissible to the personal representative, and do not pass to the successor, was much relied upon, in the question upon which there was considerable doubt as to the right of the executor of a prebendary to the presentation to benefices attached to his prebend.[y]

Lost if the bishop die, &c. before it falls vacant.

If the bishop who grants the option should die, or be translated or removed in any way from his see, before the option falls vacant, Lord Hardwicke says, "I will give no opinion to bind myself, but I am apprehensive that it will be lost;" and he adds, "my reason is, these options are made effectual by deed of grant from the bishop: he can grant for no longer than he is incumbent on the bishopric,[z] and Gibson speaks to the same effect.[a]

Or if he die after vacancy and before it is filled up.

The executors or administrators of the archbishop cannot present after the death of the bishop granting the option, although the vacancy may have happened in his lifetime; but the presentation falls to the crown during the vacancy of the see; to illustrate which Lord Hard-

[u] Gibs. 115.
[x] 3 Bing. 240.
[y] See *Mirehouse* v. *Rennell*, 8 Bing. 490.
[z] 1 Ambler, 100.
[a] Gibs. 115; and see 1 Black. Com. 379.

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wicke puts this case, "Suppose a bishop has the advowson of a living within the diocese of another bishop (in which case he has the presentation), and presents to it, and before institution dies; after his death no institution can be upon that presentation, but it falls to the crown. So if a bishop has right of collation in his own diocese, and dies before collation (which is equal to institution upon a presentation), it goes to the crown. If so, will the bishops granting these presentations to other persons put the crown in a worse situation? The case of fruit fallen, with respect to a bishop, is not like to fruit fallen in the time of tenant for life; in the former case, nothing goes to the executors or administrators of the bishop."[b]

Or if it falls vacant during the vacancy of the see.

Although Lord Hardwicke here speaks only of the executors or administrators of the bishop, as disabled from presenting in such a case, it seems that the principle involved and the illustration put by him would make the case just the same if the vacancy should occur at such a time during the lifetime of the archbishop; and that the archbishop would lose his option, if it were vacant at the time of the vacancy of the see, by the bishop of which it was granted.

And where a living is vacant under the same circumstances, and the right to fill it up has passed with the other temporal rights of the see to the crown, although the crown restore the temporalties of the see to the successor, without filling up the vacancy, the right to fill it up remains with the crown.[c]

Considerable litigation arose out of the trusts of the will of Archbishop Potter, as to the persons for whom he had bequeathed his options in trust, and the case is given at considerable length in Dr. Burn's work on Ecclesiastical Law; it is, however, unnecessary to mention it here, since the case seems to have been inserted there under a mistaken idea of its effect, for the legal question in dispute was quite foreign to that of options, and was solely a question as to the proper construction of a trust.[d]

The archbishop of a province is also entitled to the seals of a bishop deceased, which Gibson says is no more than a just and reasonable provision against their being used to ill purposes by executors and others; to prevent which they are to be broken.[e]

Whenever an archiepiscopal see is vacant, the dean and

[b] *Potter* v. *Chapman*, 1 Amb. 100.
[c] See *Rennell* v. *Bishop of Lincoln*, 7 B. & Cres. 186.
[d] *Richardson* v. *Chapman*, in Chancery and before the House of Lords,
[e] Gibs. 133.

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chapter of his diocese are guardians of the spiritualties.[f] And when the archbishopric of Canterbury is vacant, they may grant faculties, licenses and dispensations throughout both provinces, as their archbishop might have done.[g]

Resignation, &c. of archbishop.

As all resignations must be made to some superior, an archbishop could resign to none but the king himself. And as a bishop may be deprived by the archbishop, and in such manner as will be hereafter mentioned, so probably an archbishop might be deprived for sufficient cause by the king as supreme head of the Church, although no precedent for the exercise of such authority has ever happened, or is ever likely to happen in this country.

Section II.

Of Bishops.

Having thus far spoken of the provinces, and the archbishops who preside over them, we now come to the second ecclesiastical division, namely, that of dioceses.

The bishop is the head of the clergy in his diocese, inspects the manners of the people and clergy therein, and, if necessary, punishes them with ecclesiastical censures; and for this purpose he has several courts under him, and may visit at pleasure every part of his diocese.[h]

Style and privileges of.

His style, title and privileges are inferior to those of an archbishop. When he is vested in his bishopric, he is said to be installed; he writes himself by Divine Permission, and has the title of Lord, and Right Reverend Father in God; and he may retain and qualify six chaplains. By the preface to the form and manner of making, ordaining and consecrating bishops, priests and deacons, which has been confirmed by several acts of parliament,[i] every man which is to be ordained or consecrated bishop shall be full thirty years of age. The reason for which, as given by the canon law, is that our Saviour was baptized and began to preach at that age,[k] but in ancient times there seems to have been no such restriction as to age in this country.

Bishops and their clergy formerly.

For many centuries after the Christian era, the bishop was the universal incumbent of his diocese, and received all the profits, which were then but offerings of devotion, out of which he paid the salaries of such as officiated under him as deacons and curates in places appointed. Afterwards, when churches became founded and endowed,

[f] Godolph. 44. [g] 25 Hen. 8, c. 21. [h] 1 Black. Com. 382.
[i] 3 & 4 Edw. 6, c. 10; 5 & 6 Edw. 6, c. 1; 8 Eliz. c. 1; 13 & 14 Car. 2, c. 4. [k] Dist. 78, c. 3; 1 Burn's E. L. 196.

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he sent out his clergy to reside and to officiate in those churches, reserving to himself a certain number in his cathedral, to counsel and assist him, which are now called deans and canons, of whom we shall have to speak more particularly in their proper order.[1]

Election, &c. of bishops.

The mode of election, confirmation and consecration is the same in the case of bishops and archbishops; for it must be observed, that each archbishop is also bishop, and has his own diocese, wherein he exercises episcopal jurisdiction, as in his province he exercises archiepiscopal: and the following is the history thereof given by Blackstone.

History of.

The bishop is elected by the chapter of his cathedral church, by virtue of a license from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy, till at length, it becoming tumultuous, the emperors and other sovereigns of the respective kingdoms of Europe took the appointment, in some degree, into their own hands, by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalties, which now began almost universally to be annexed to these spiritual dignities; without which confirmation and investiture, the elected bishop could neither be consecrated, nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A.D. 773, by Pope Hadrian the First and the Council of Lateran, and universally exercised by other Christian princes; but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, whilst the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England (as well as other kingdoms in Europe) even in the Saxon times; because the right of confirmation and investiture were in effect (though not in form) a right of complete donation. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual methods of granting these investitures, which was *per annulum et baculum*, by the prince delivering to the prelate a ring, and pastoral staff

[1] See Tithes, post; Godolph. 365.

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or crosier, pretending that this was an encroachment on the Church's authority, and an attempt by these symbols to confer a spiritual jurisdiction; and Pope Gregory VII., towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them. This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority; and long and eager were the contests occasioned by this papal claim. But at length, when the Emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investiture for the future *per sceptrum*, and not *per annulum et baculum*, and when the kings of England and France consented also to alter the form in their kingdoms, and receive only the homage from the bishops for their temporalties, instead of investing them by the ring and crosier, the court of Rome found it prudent to suspend for awhile its other pretensions.[m]

This concession was obtained from King Henry I. by Archbishop Anselm; but King John, (about a century afterwards,) in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops, reserving only to the crown the custody of the temporalties during the vacancy; the form of granting a license to elect, (which is the original of our *congè d'eslire*,) on refusal whereof, the electors might proceed without it; and the right of approbation afterwards; which was not to be denied without a reasonable and lawful cause. This grant was expressly recognized and confirmed in King John's *Magna Charta*, and was again established by statute 25 Edw. III. stat. 6, s. 3.

Congè d'eslire.

But by statute 25 Hen. VIII. c. 28, the ancient right of nomination was in effect restored to the crown, it being enacted that, at every future avoidance of a bishopric, the king may send the dean and chapter his usual license to proceed to election, which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect; and if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may by letters-patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signi-

[m] Modern Universal Hist. xxv. 363; xxix. 115; 1 Black. Com. 378, 379.

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fied by the king's letters-patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops, requiring them to confirm, invest, and consecrate the person so elected, which they are bound to perform immediately, without any application to the see of Rome. After which the bishop elect shall sue to the king for his temporalties, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *præmunire*.[n] Confirmation of bishops.

Thus elected and confirmed, he is fully invested to exercise all spiritual jurisdiction; but he is yet not completely bishop until consecration; since before that he may not sue for his temporalties:[o] which ceremony, however, being wholly regulated by the prescribed form of consecration, need not be mentioned here. But it must be observed that a bishop is only once consecrated, and the ceremony is not repeated upon his translation, although the election and confirmation in the manner we have mentioned takes place as often as he is translated;[p] and he is said to be translated when he is preferred to some other see. Consecration of. Translation.

As to the place of consecration, the dean and chapter of Canterbury claim it as an ancient right of that church that every bishop of the province is to be consecrated in it, or the archbishop to receive from them a license to consecrate elsewhere; and we are assured that a long succession of licenses to that purpose are regularly entered in the registry of that church. And although between the years 1235 and 1300, that point was controverted with the chapter, it ended in their favour, and in the further confirmation of the privilege, which was first granted by Thomas Becket, and afterwards confirmed by St. Edmund. And in Cranmer's register there is a memorandum that no bishop may be consecrated without the church of Canterbury but by the special license of the dean and chapter of Canterbury, under the chapter seal.[q]

All the dignities and benefices which a bishop was possessed of before his election become void so soon as he has been consecrated; and, when he is translated, his former see becomes void upon his confirmation; and this distinc- Benefices held by bishop at time of his election.

[n] Blackst. Comm. 330. For the offence and penalties of a *præmunire*, see post, Book VIII.
[o] Gibs. 114; Wats. c. 40. [p] Godolph. 29; Gibs. 114.
[q] Gibs. 111; 1 Burn's E. L. 203.

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tion is important in the case where the bishop is in possession of a dignity or benefice granted *in commendam*.

Every person being chosen, elected, nominated, presented, invested and consecrated as aforesaid, and suing his temporalties out of the king's hands, and making oath to the king and to none other, as aforesaid, shall and may be thrononized or installed as the case shall require, and shall have and take his only restitution out of the king's hands of all the possessions and profits, spiritual and temporal, belonging to such archbishopric or bishopric, and shall be obeyed in all things according to the name, title, degree and dignity he shall be chosen or presented to; and do and execute every thing touching the same, as any archbishop or bishop of this realm, without offending of the prerogative royal of the crown, and the laws and customs of the realm, might at any time theretofore do. And thereupon the bishop, being introduced into the king's presence, shall do his homage for his temporalties or barony by kneeling down and putting his hands between the hands of the king sitting in his chair of state, and by taking a solemn oath to be true and faithful to his majesty, and that he holds his temporalties of him; and lastly, he shall, within six months after his admission, take the oaths of allegiance, supremacy and abjuration, in one of the courts of Westminster, or at the quarter sessions of the peace.

Attendance in parliament.

A bishop, upon his election, shall be taken and reputed as a lord elected; and they are peers of the land, being summoned to the parliament, as well as the other nobles of the land; but the right under which they sit there, whether in respect of their baronies, or by usage and custom, may be considered still a *vexata questio* into which it would be unprofitable to enter here.[r] It appears, however, that the bishops sat in the wittenagemote under the Saxon monarchs; and the bishops created by Henry VIII. sit in parliament now, though these certainly do not hold their lands by baronial tenure.

Not necessary for the validity of an act of parliament.

Although, according to the law and customs of parliament, the bishops must be summoned thereto, yet if they absent themselves voluntarily, the king, the lords temporal, and the commons, may make an act of parliament without them; for the lords spiritual and temporal are now only one estate,[s] and consequently neither of them have any separate negative; and if a bill should pass their house, there could be no doubt of its validity, though every lord

[r] Upon this question see Hargrave's note to Co. Litt. 134; and Hallam's Middle Ages, chap. 8.

[s] Dyer, 60.

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spiritual should vote against it, as was the case with the Act of Uniformity, passed in the first year of Elizabeth; and in the same manner, if the lords temporal present happened to be inferior in number to the lords spiritual, and every one of the former should give his vote to reject the bill, which should nevertheless be passed, it is presumed there could be as little doubt of its validity, although Lord Coke has, without much apparent reason, doubted whether this would not be rather an ordinance than an act of parliament.[t]

Their right to vote on capital trials.

It was holden by the judges in 7th Hen. VIII. that the king may call a parliament without any spiritual lords. This was also exemplified in fact in the two first parliaments of Charles II., wherein no bishops were summoned till after the repeal of the stat. 16 Car. I. c. 27.[u] And we have an example at the present day of acts done by the lords temporal only, without the presence or concurrence of the lords spiritual, for the lords spiritual have long been wont to withdraw from the house when the question of condemnation or acquittal on any capital charge is to be decided; this they probably did originally in obedience to the canon law; and although they have always protested in such cases that such withdrawal should not be any infringement of their right if the canons were out of the question, yet it must be considered doubtful whether their right (being now contrary to custom) could be successfully insisted on. It appears however that there are several instances wherein bishops did sit and vote, or in which their right to sit and vote has been acknowledged in such cases; but none, as it seems, later than the reign of Henry V. Gibson says upon this subject, that when it came to be a question in the reign of King Charles II., the most eminent civilians of that time were advised with by the bishops in convocation, and unanimously gave an opinion under their hands, that by their staying in the House of Lords while cases of high treason were in agitation there, they were in no danger of irregularity, which was the ancient penalty annexed to the canon.[x] But it does not follow from this opinion that the bishops could have remained throughout the whole trial, and while the question of life or death came to be decided. Mr. Hawkins, as quoted by Dr. Burn, observes, "that it is said in the Year Book of 10 Edw. IV. c. 6, that upon the trial of a peer in parliament, the bishops shall make a procurator, because they cannot consent to the death of a man; but this is said to be wholly grounded on a

[t] 4 Inst. 25; 1 Blackst. Comm. 156.
[u] Note to 1 Blackst. Comm. 156; Keilw. 184.
[x] Gibs. 125.

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canon not in force at this day; neither do I find (says he) any precedent wherein they have been excluded against their consent, or have withdrawn themselves, without a protestation of their right, or making a proxy; and the judgment against the Spencers was expressly reversed for this reason, among others, because the bishops were not present; and in the precedents chiefly insisted on of the other side, it is not expressly said that they were not present, and it doth not clearly appear but that they might be included under the word peers. However, it hath been always admitted that they have a right to vote in a bill of attainder."[y] Upon this subject Blackstone says, "It has been a point of some controversy whether the bishops have now a right to sit in the court of the Lord High Steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of King William, 'all peers who have a right to sit and vote in parliament;' but the expression had been much clearer if it had been 'all lords,' and not 'all peers,' for though bishops, on account of the baronies annexed to their bishoprics, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility; and perhaps this word might be inserted purposely, with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that in the eleventh chapter of the Constitutions of Clarendon, made in parliament 11th Henry II., they are expressly excused, rather than excluded, from sitting and voting in trials, when they come to concern life or limb: '*episcopi sicut cæteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem:*' and Becket's quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law,) but of the general rule, that compelled the bishops to attend at all. And the determination of the House of Lords in the Earl of Danby's case, which hath ever since been adhered to, is consonant to these constitutions, 'that the lords spiritual have a right to stay and sit in court in capital cases till the court proceeds to the vote of guilty or not guilty.'[z] It must be noted that this resolution extends only to trials in full parliament; for to the court of the lord high steward,

[y] Hawkins, 423. [z] Lords' Journals, 15th May, 1679.

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(in which no vote can be given but merely that of guilty or not guilty,) no bishop, as such, ever was or could be summoned; and though the statute of King William regulates the proceedings in that court, as well as in the court of parliament, yet it never intended to new model or alter its constitution, and consequently does not give the lords spiritual any right in cases of blood which they had not before: and what makes their exclusion more reasonable is, that they have no right to be tried themselves in the court of the lord high steward, and therefore surely ought not to be judges there; for the privilege of being thus tried depends upon nobility of blood rather than a seat in the house, as appears from the trials of popish lords, or lords under age, and (since the Union) of the Scots nobility, though not in the number of the sixteen; and from the trials of females, such as the queen consort or dowager; and of all peeresses by birth, and peeresses by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband." [a]

Order of their sitting in parliament.

The bishops sit in parliament next to the Archbishop of York, whose place has been already mentioned, in the following order: 1st, the Bishop of London; 2nd, the Bishop of Durham; 3rd, the Bishop of Winchester; and then the rest, according to their ancienties; but if either of them is also a member of the privy council, then his seat is next after the Bishop of Durham.[b]

Not tried by peers.

Bishops in respect of their persons are not peers with the nobility; so that they are not tried by the house of peers in cases of alleged crimes, like the lords temporal, but they are tried by a jury in the same manner as commoners, as was the case with Archbishop Cranmer and Bishop Fisher.

Vacancy of a see.

When any episcopal see is vacant, the archbishop of the province is guardian to the spiritualties; and all ecclesiastical jurisdiction is during that time exercised by him or by his commissioners; but he cannot as such consecrate or ordain, or present to vacant benefices, or confirm a lease.[c]

During such vacancy, whether it be of an archbishopric or bishopric, the king has the custody of all the lay revenues, lands and tenements which belong to the see, and which are called the temporalties thereof; and the king's revenue derived from this source was formerly very considerable; and Queen Elizabeth kept the see of Ely vacant nineteen years, in order that she might receive the reve-

[a] Blackst. Comm. 263.
[b] 31 Hen. 8, c. 10, s. 3; Co. Litt. 94.
[c] Godolph. 21, 39.

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nues; but now it is reduced to nothing; for as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalties quite entire and untouched from the king, at the same time that he does homage to his sovereign, and then he has a fee simple in his bishopric, and may maintain an action for the profits.[d]

All the bishops of his province, with respect to the archbishop, are sometimes called his suffragans.

Suffragans.

But formerly, and in the proper sense of the word, those were called suffragan bishops, who being consecrated in the same manner as other bishops, supplied their places when the latter were absent upon embassies, or in multiplicity of business. They were called suffragan, from *suffragari*, to assist or help; and they were also called *choriepiscopi*, or bishops of the country, as a distinction from the proper bishops of the see. They were consecrated by the archbishop of the province to execute such power and authority, and to receive such profits as were limited in their commissions, by the bishop or diocesan whose suffragans they were. And as the bishop fixed his residence at the principal city, so probably the suffragans resided in the more considerable towns of the diocese. But it does not appear that they had any title as suffragan of any particular place, which has induced an opinion that they were itinerant. Whether they were in any manner subordinate or in subjection to the urban bishop is somewhat doubtful; but the most probable opinion seems to be, that they were at one time equal with the urban bishops, and subsequently became inferior. All the particulars connected with this office are known by little more than conjecture. The important fact appears however to be very generally acknowledged, that, however good in theory, the institution worked practically bad. Harmony, it is said, did not long together reign between the bishops and the suffragans; until the Church becoming at last weary of the continual clashing of the episcopal and the choriepiscopal interests, determined in the time of Charlemagne on the entire suspension of the latter order.[e]

It is considered needless here to enter more fully into this doubtful subject of the sees, nomination and consecration, residence, or power of suffragan bishops, since they have been now for many years disused. As a suffragan was formerly assistant to the bishop in matters of

Coadjutors.

[d] Godolph. 30; 1 Burn's E. L. 246.

[e] See Horæ Rurales Decanicæ, vol. i. p. 22 to 56; a recent work, in which a variety of authorities have been collated.

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orders, so also was one, termed a coadjutor, his assistant in matters of jurisdiction. It was not necessary that he should be episcopally ordained, since the duties merely episcopal never devolved on him, but on the suffragan; so that the suffragan and coadjutor together, in their several persons, performed the offices of one bishop. The coadjutor was probably less often appointed than the suffragan, and anciently he was appointed when the bishop grew very old or infirm, in order to succeed him.[f]

Former secular jurisdiction of the Bishops of Durham and Ely transferred.

The Bishop of Durham had formerly, besides his ordinary jurisdiction in his see as bishop, a further palatine jurisdiction, as it was called, in the county of Durham; and he was thereby entitled to all forfeitures of lands or goods for treason or otherwise, and all mines of gold and silver, treasure trove, deodands, escheats, fines and amercements, and all *jura regalia*. But it was enacted, in the year 1836,[g] that all the palatine jurisdiction, power, and authority, which had been theretofore vested in and belonging to him, as such bishop, should thenceforth be transferred to and vested in the king, as a franchise and royalty separate from the crown, in the same manner as it had been before exercised and enjoyed by the bishop; and that all the last mentioned profits and emoluments should in like manner be transferred and vested in the king. But it was provided, that nothing in the act should have the effect of severing or separating from the bishopric, or of affecting the rights of the bishop in any hereditaments, profits, or emoluments of any kind or description whatever, except those already mentioned; and certain compensations were given by the act to the persons affected by its provisions.

In like manner, the Bishop of Ely had formerly secular authority in certain places within his diocese; but by an act passed in the same year,[h] it was enacted that all his secular authority should cease and determine, and thenceforth become vested in the king, and compensation was given to persons affected by the act, and various provisions made for carrying the alterations into effect.

Former privilege of London residences of bishops.

It appears that formerly the houses of the bishops, in which they were resident during their attendance on parliament or the court, and upon their own proper occasions, were extra diocesan; and that while residing there, the bishops might freely exercise jurisdiction in the same manner as in their own dioceses; upon which subject Sir William Scott says, "I conceive by the ancient law that bishops should be empowered to act in their London houses

[f] Ibid. [g] 6 & 7 Will. 4, c. 19. [h] 6 & 7 Will. 4, c. 87.

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as in their dioceses, and for that purpose their residences in London were considered as a part of their dioceses." We collect this from what is said by Bishop Gibson; and from the statute 33 Hen. VIII. c. 31, relating to the bishopric of Chester, where it is provided "that he shall be held resident in the diocese of Chester, and have jurisdiction in his house at Weston, within the diocese of Coventry and Litchfield, during his abode there, as other bishops have in the houses belonging to their sees, wheresoever they lie." It is said that this is only a private act, and it is so in its enactments; but it gives a general description of the bishop's jurisdiction in such places. It refers to a rule of law which was going into desuetude; and in the statute 31 Hen. VIII. relative to the exchange of houses between the Bishops of Carlisle and Rochester and the Lord Russell, there is a clause providing "that they should have the same authority in their new houses at Lambeth and Chiswick, as they had exercised in their old houses; and Gibson says, that at the time when he wrote, "there were none left but Lambeth House and Croydon, belonging to the Archbishop of Canterbury; Winchester Place, now removed from Southwark to Chelsea; and Ely House, in Holborn." The same privilege has not been attached to new houses, and is not annexed to the present Ely House, though a visitatorial jurisdiction is allowed in it by statute; and Sir William Scott further observes in the same case—"This is the claim of a layman to a *privilege now extinct in the bishops;* and it is a claim to a local privilege, whereas it was merely personal, and was confined to the residence of the bishop; so that when Ely House, in Holborn, had ceased to be the residence of the bishop, it was held to be no longer exempt from the jurisdiction of the Bishop of London."[k] The origin of the privilege is said to have been principally founded on the ancient rule, that their residence should be within their diocese; the cause and the nature of it was therefore personal.

Duties of a bishop.

The principal duties of a bishop towards his clergy will be found to be comprised, in ordination, whereby he calls them into existence as persons ecclesiastical; in instituting or licensing them to their benefices or cures; in visiting them and exercising superintendence over their morals; and enforcing discipline and obedience to the laws ecclesiastical; for which purpose he has now been vested with ample power; and in suspending or depriving them for due cause. Over all the people in his diocese he exercises

[k] See *Barton* v. *Wells*, 1 Hagg. Cons. 31.

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a general pastoral authority; but they are more particularly brought under his notice at the time of their confirmation.

All these several duties, with the exception of those of visitation and confirmation, will be found fully treated of under other heads; but these two will be mentioned here.

Visitation, as commonly understood, denotes the act of the bishop, or other ordinary, going his circuit through his diocese, or district, with a full power of inquiry into such matters as relate to church government and discipline.[k] Visitation.

By the canon law, visitations were to be once a year; but that was intended of parochial visitations, or a personal repairing to every church, as appears not only from the assignment of procurations, but also by the indulgence, where every church cannot be conveniently repaired to, of calling together the clergy and laity from several parts into one convenient place, that the visitation of them may not be postponed. From this indulgence, and the great extent of the dioceses, grew the custom of citing clergy and people to attend visitations at particular places. But as to parochial visitations, or the inspection into the fabrics, mansions, utensils, and ornaments of the church, that care hath been long devolved upon the archdeacons; who, at their first institutions in the ancient church, were only to attend the bishops at their ordination, and other public services in the cathedral; but being afterwards occasionally employed by them in the exercise of jurisdiction, not only the work of parochial visitation, but also the holding of general synods or visitations, when the bishop did not visit, came by degrees to be known and established branches of the archidiaconal office as such, which by this means attained to the dignity of ordinary, instead of delegated jurisdiction; and by these degrees came on the present practice of triennial visitations by bishops; so as the bishop is not only not obliged by law to visit annually, but (what is more) is restrained from it.[l]

Formerly annual by bishops.

Which has now devolved on archdeacons.

Now triennial by bishops.

Every corporation, whether lay or ecclesiastical, is visitable by some superior, and every spiritual person, being a corporation sole, is visitable by the ordinary. There is, however, an exception to this rule in our ecclesiastical polity; for, by composition, the Archbishop of Canterbury never visits the Bishop of London. During a visitation, all inferior jurisdictions are inhibited from exercising jurisdiction; bnt this right from the inconvenience attending the exercise of it is usually conceded, so that the exercise

Who are visitable, and by whom.

[k] Ayl. Parer. 514. [l] 4 Burn's E. L. 16; Gibs. 958.

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of jurisdiction in the inferior court is continued notwithstanding.

Canon as to visitation.

By the 137th canon, it is enjoined that, forasmuch as a chief and principal cause and use of visitation is, that the bishop, archdeacon, or other assigned to visit, may get some knowledge of the state, sufficiency, and ability of the clergy, and other persons whom they are to visit; we think it convenient that every parson, vicar, curate, schoolmaster, or other person licensed whosoever, do at the bishop's first visitation, or at the next visitation after his admission, show and exhibit unto him his letters of orders, institution, and induction, and all other his dispensations, licences, or faculties whatsoever, to be by the said bishop either allowed or (if there be just cause) disallowed and rejected; and being by him approved, to be (as the custom is) signed by the registrar, and that the whole fees accustomed to be paid in the visitations, in respect of the premises, be paid only once in the whole time of every bishop, and afterwards but half of the said accustomed fees in every other visitation during the said bishop's continuance.

Exhibiting letters of orders, &c.

Fee for allowing.

Gibson says that none but the bishop, or other person exercising ecclesiastical authority by commission from him, hath right, *de jure communi*, to require these exhibits of the clergy; therefore if any archdeacons require it, it must be on the foot of custom, the beginning whereof, he says, hath probably been encroachment, since it is not likely that any bishop should give to the archdeacon and his official a power of allowing or disallowing such instruments as have been granted by himself or his predecessors.[m] And the canon last mentioned appears to be in observance now, for it is the practice for each clergyman to exhibit these letters of orders, &c., on his first attendance at the bishop's visitation, and on the first appointment to an office, &c., in any diocese, as well as upon several other occasions.[n]

The above appears to be all that is necessary to be observed of the bishop's visitation; for the ordinary duties of a visitor, as an ecclesiastical superior, appear in a great measure to have been usurped by the archdeacons, in speaking of whom we shall have occasion again to return to this subject of visitations. And the case of a rector who refused to preach a visitation sermon, when required to do so by the archdeacon, is there mentioned; upon which it may be here observed, that, if that case may be taken as an authority to show that compliance with the order of an

[m] Gib. 959.

[n] Communicated to the author as being the present practice.

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archdeacon in such a matter might be enforced, it seems *à fortiori* that the bishop's order in a similar case must be obeyed.[o]

Peculiars.

To this general power of the bishop to visit his clergy, there exist many cases of exception; for there are certain places, the incumbent and people of which are exempt from his jurisdiction, and have an ordinary of their own, which places are usually called peculiars.[p]

Confirmation.

The rubric as to.

By the rubric at the end of baptism of those that are of riper years, it is expedient that every person so baptized shall be confirmed by the bishop so soon after his baptism as conveniently may be, that so he may be admitted to the holy communion.

And by the rubric before the office of confirmation, so soon as children are come to a competent age, and can say in their mother tongue the Creed, the Lord's Prayer, and the Ten Commandments, and also can answer to the other questions of the catechism, they shall be brought to the bishop.

Canons as to.

"For as much as it hath been a solemn, ancient, and laudable custom in the church of God, continued from the Apostles' times, that all bishops should lay their hands upon children baptized, and instructed in the catechism of the Christian religion, praying over them, and blessing them, which we commonly call confirmation, and that this holy action hath been accustomed in the Church in former ages, to be performed in the bishop's visitation every third year; we will and appoint that every bishop, or his suffragan, in his accustomed visitation do, in his own person, carefully observe the said custom. And if in that year, by reason of some infirmity, he be not able personally to visit, then he shall not omit the execution of that duty of confirmation the next year after, as he may conveniently."[q]

Duties of the minister as to.

Every minister that hath cure and charge of souls, for the better accomplishing of the orders prescribed in the Book of Common Prayer concerning confirmation, shall take especial care that none shall be presented to the bishop for him to lay his hands upon, but such as can render an account of their faith according to the catechism in the said book contained. And when the bishop shall assign any time for the performance of that part of his duty, every such minister shall use his best endeavour to prepare and make able, and likewise to procure as many

[o] See post, Archdeacon's Visitation Sermon.

[p] The great probability that the anomalies of peculiars will very soon be put an end to has made it appear advisable to omit any further mention of them.

[q] Canon 60.

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as he can to be then brought, and by the bishop to be confirmed.[r]

And by the rubric, whensoever the bishop shall give knowledge for children to be brought unto him for their confirmation, the curate of every parish shall either bring or send in writing, with his hand subscribed thereunto, the names of all such persons within his parish, as he shall think fit to be presented to the bishop to be confirmed. And if the bishop approve of them, he shall confirm them, according to the form in the Book of Common Prayer.

The obligation therefore on the curate to bring or send to the bishop the names of the children in his parish who are to be confirmed, and on the bishop to confirm them, unless he has cause for disapproval, seems positive.

The sixty-first canon above mentioned contains, as it will be observed, general directions as to the minister's duty in respect of the persons to be confirmed; any minister not observing those directions would be liable to punishment for a breach of the laws ecclesiastical. The particular manner in which the directions of that canon may be carried out would be a matter for the discretion of the bishop, who usually issues his directions to his clergy for that purpose; and those directions, so long as they are consistent with the canon, it would seem that the clergy are bound to obey; and it is a matter in which, for many reasons, church discipline and a due subordination to the bishops is peculiarly necessary to be observed.

It will be observed that the canon and the rubric, although prescribing the duties of the minister as being incumbent on him in this matter, do not appear to render it essential that persons, coming to be confirmed, should have been first approved of by him; although without that approval he could not present them to the bishop. For there seems to be no restriction on the bishop as to whom he will confirm; and supposing them to be approved of by him, there is nothing to prevent persons from presenting themselves, or the bishop from confirming them. On the other hand, it seems that if the minister should refuse or neglect to comply with the bishop's directions as to preparing and sending his parishioners for confirmation, this might be a good cause for the non-approval of such persons by the bishop. Consequently, that, in different ways, the bishop has the entire power of directing the preparation of candidates for confirmation in any manner he may think fit; and of all the various circumstances connected with it; and with the mode of bringing them to be

[r] Canon 61.

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confirmed: and this independently of the minister, if any difficulty should arise respecting his co-operation and concurrence.[r]

How the office may determine.

Lastly, the office of bishop and archbishop may determine by death; by the substitution of other persons to perform the duties, on account of the incapacity of the party holding the office; by deprivation, for any very gross and notorious crime, and also by resignation.

Provisions for the case of the incapacity of any bishop or archbishop.

The disuse of the suffragans and coadjutors appears in some cases to have been found inconvenient: and an act of parliament has accordingly been very recently passed,[s] which provides for the performance of the episcopal functions in case of the incapacity of any bishop or archbishop.

Proceedings of the commissioners.

By that act it is provided, that whenever any archbishop of England or Ireland shall have reason to believe that any bishop of his province is incapable, by reason of mental infirmity, of duly performing his episcopal functions, it shall be lawful for such archbishop to give a notice under his hand to such bishop, that unless within fourteen days from the service thereof satisfactory cause to the contrary be shown by or on behalf of such bishop, the said archbishop will issue a commission to inquire into the state of the mental capacity of the said bishop; and if within fourteen days from the service of such notice cause to the contrary be not shown to the satisfaction of the archbishop, it shall be lawful for such archbishop to issue a commission to three persons, being members of the united church of England and Ireland, one of whom shall be his vicar-general, and another one of the bishops of the province, to inquire into the facts of the case: provided always, that the aforesaid notice shall be served by leaving a copy thereof with the bishop or his secretary.[t]

For the purposes of this inquiry, the commissioners may compel the attendance of witnesses: and they have the same powers as now belong to the Consistorial Court, and to the Arches Court respectively.[u] And the witnesses on both sides may be examined by the commissioners on oath, such oath to be administered by one of them; or they may take evidence on affidavits to be sworn before one of the commissioners, or before a master in chancery.[x]

Notices of meetings, &c.

Notice of the time and place at which the first meeting of the commissioners shall be holden, for the purpose of prosecuting the inquiry, shall be given in writing, under the hand of one of the said commissioners, to the bishop; and shall be served upon him, by leaving one copy thereof

[r] See *Sanders* v. *Head*, Arches Court, 7 Jur. 728.
[s] 6 & 7 Vict. c. 62. [t] Sect. 1. [u] Sect. 2. [x] Sect. 3.

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with the bishop or his secretary, and another copy thereof with the registrar of his diocese, fourteen days at least before the meeting; and it shall be lawful for the bishop, and his nearest friend or one of his next of kin, or his or their counsel, proctor, or agent, to attend the proceedings of the commission, and to examine any of the witnesses; and all such proceedings shall be public, unless on the special application of the bishop, or his nearest friend, or any one or more of his next of kin, the commissioners shall think fit to direct that the same or any part thereof shall be private: provided that the said commissioners shall not direct the proceedings or any part thereof to be in private, nor shall take evidence upon affidavit, if the bishop, or his counsel, proctor, or agent, object thereto.[y]

Report of commissioners.

The commissioners, or any two of them, shall transmit to the archbishop, under their hands and seals, the depositions of witnesses taken before them, and all such affidavits, and also a report of the opinion of the majority of the commissioners, whether or not the bishop is incapable, by reason of mental infirmity, of duly performing his episcopal functions; and such report shall be filed in the registry of the diocese; and the commissioners shall also, upon the application of the bishop, or of his nearest friend, or any one or more of his next of kin, or his or their counsel, proctor, or agent, cause to be delivered to such party a copy of the said report and the depositions and affidavits.[z]

Costs of the inquiry.

The expenses of this inquiry are to be certified under the hands of two of the commissioners, and when allowed by the archbishop by whom the commission shall have issued, are to be defrayed out of the revenues of the bishopric;[a] and this, as it seems, is to be the case, whether the report of the commissioners be against the capacity of the bishop or in his favour; and there seems to be no appeal from an award of costs of this kind, or any other mode of providing for them, even if the commission should appear to have been issued on frivolous grounds.

Case of an archbishop.

In case of the supposed incapacity of an archbishop, the like proceedings are to be adopted: except that in such a case all things which would have been to be done by the archbishop of the province in the case of a bishop, are, in the case of an archbishop, to be done by the Lord Chancellor of Great Britain, or the Lord Chancellor of Ireland, according as the archbishop may be of England or Ireland; and of the three persons to be appointed commissioners in such a case, one shall be a bishop of the

[y] Sect. 3. [z] Sect. 5. [a] Sect. 6.

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province, another shall be the other archbishop, and the third, if it be in England, shall be the Master of the Rolls or one of the Vice-Chancellors, or if in Ireland, the Master of the Rolls or one of the Barons of the Exchequer. In every such case the report of the commissioners shall be filed in the registry of the province, and the expenses of the inquiry, when allowed by the lord chancellor, by whom the commission may have been issued, are to be defrayed out of the revenues of the archbishopric.[b]

Oath of commissioners.

Every commissioner appointed for this purpose shall, at or before the first meeting of the commissioners for the purpose of prosecuting the inquiry, take, before the archbishop or lord chancellor issuing such commission, or before a master extraordinary in chancery, the following oath: "I do swear, that I will faithfully, impartially and honestly, according to the best of my skill and knowledge, execute the several powers and trusts reposed in me under a commission of inquiry issued by , relating to the capacity of , Lord Bishop [*or* Archbishop] of , duly to perform his (episcopal *or* archiepiscopal) functions, and that without favour or affection, prejudice or malice. So help me God."[c]

Appeal from the report of commissioners to the queen in council.

At any time before the expiration of twenty-eight days after the filing of the report of the commissioners in the registry of the diocese or province, as the case may be, it shall be lawful for the bishop or archbishop, concerning whom such inquiry shall have been made, or for his nearest friend, or any one or more of his next of kin, or his or their counsel, proctor, or agent, to present a petition to her majesty in council, or to the lord-lieutenant or other chief governor or governors of Ireland, for the time being, in council, praying that no such letters patent, as are hereafter mentioned, may be issued; and at the same time to lodge with the clerk of the council an office copy of the report of the commissioners, and of the depositions and affidavits whereon the same is founded; and the matter of such petition shall be heard or considered on such report, depositions, and affidavits, in England, before the judicial committee of the privy council, in case her majesty shall be pleased to refer it to the said committee; and in Ireland, before the lord-lieutenant, or other chief governor or governors of Ireland, for the time being, in council; and a copy of the order in council, containing the decision in the matter of such petition, shall, by the clerk of the council, be transmitted to the registry of the diocese or province, as the case may be, and shall be there filed.[d]

[b] Sect. 7. [c] Sect. 8. [d] Sect. 9.

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Judicial committee of privy council, how constituted for such purpose.

Every archbishop and bishop of the United Church of England and Ireland, who may at the time be a member of the privy council, shall be a member of the judicial committee of the privy council for the purposes of this act.[f]

Appointment of a bishop to perform the episcopal functions;

When the incapacity of the bishop has been thus fully established, and at the expiration of twenty-eight days, if there has been no petition of appeal, or if there has been an appeal, then at any time after it has been pronounced against, the archbishop or lord chancellor, as the case may be, may make request to her majesty for remedy thereof; and thereupon it shall be lawful for her majesty, by letters patent, to appoint one of the bishops of the same province, being a bishop of England or Ireland, and not being one of the commissioners, to exercise all the functions and powers, as well with regard to the temporalties as the spiritualties, of the bishop or archbishop so found to have become incapable; and in case of the death or incapacity, deprivation, or suspension of the bishop so appointed, or in case her majesty shall, on the petition of such bishop, be pleased to relieve him from the further exercise of such functions and powers, it shall be lawful for her majesty in like manner to appoint another such bishop, and so as often as the case shall happen: and it shall be lawful for the bishop so appointed, and the archbishop or lord chancellor, as the case may be, by whom the commission was issued, or any successor of such archbishop or lord chancellor, by an instrument in writing under their hands and seals, jointly to commission and appoint a spiritual person to assist in the administration of the temporalties of the see, and in such matters of jurisdiction of the see or province of the bishop or archbishop, so found to have become incapable, as shall and may be lawfully committed to him, which spiritual person shall give to the bishop and to the archbishop or lord chancellor by whom he shall be appointed, a bond, with sufficient surety in a sufficient sum, with a condition for his duly accounting for the monies which may come to his hands by virtue of his office; and it shall be lawful for the bishop so appointed, and the same or any succeeding archbishop or lord chancellor, at their pleasure, to revoke and cancel such appointment; and in any such case, or upon the death or resignation of such spiritual person, in like manner to commission and appoint another spiritual person, on his giving such security as before mentioned, and so from time to time as often as the case shall happen; and all things done by virtue of this act, within the limits of his authority, by any such

and a spiritual person to assist in administration of the temporalties.

[f] Sect. 10.

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bishop or spiritual person, shall be done in the name of the bishop or archbishop so found to have become incapable, and under the seal of such bishop or archbishop, where a seal is required to be used, and shall be as valid as if done by such bishop or archbishop; and the receipt of the bishop or spiritual person, so appointed as aforesaid, for such sums as he shall receive by virtue of his commission, shall be good and effectual discharges for the monies which in such receipts shall be acknowledged to have been received: provided that it shall not be lawful for such bishop or spiritual person to present, collate, nominate or license any clerk to any ecclesiastical benefice in the gift or patronage of the bishop or archbishop so found to be incapable, or to sanction the union or disunion of any benefice in such gift or patronage with or from any other benefice, without the approval of the archbishop or lord chancellor by whom the commission was issued; or, without the like approval, to appoint or displace any officer of the see or province; and no lease or deed of conveyance, exchange, or enfranchisement of any lands or possessions belonging to the see or province, to be executed by any bishop or spiritual person appointed as aforesaid, shall be valid unless approved and executed by the archbishop of the province, or, in case of the incapacity of the archbishop, by the lord chancellor of Great Britain, or the lord chancellor of Ireland, as the case may be, and in each case sealed also with the seal of the ecclesiastical commissioners for England, or of the ecclesiastical commissioners for Ireland, as the case may be.[g]

Restrictions on exercise of authority by them.

The bishop and the spiritual person thus appointed, shall, for the purpose of enforcing payment of the revenues of the see, have severally all the same legal rights, powers, and remedies, by action, suit, or distress, as might have been exercised by the bishop or archbishop if no commission had issued; but neither of them shall be accountable for any monies which shall not have been actually received by them respectively.[h]

Power to recover revenues.

It shall be lawful for her majesty to assign to the spiritual person to be appointed as aforesaid, a yearly allowance, not exceeding one-sixth part of the revenues of the bishopric or archbishopric, which shall be defrayed out of the revenues of the bishopric or archbishopric; and such spiritual person shall also, out of such revenues, defray and reimburse to the bishop to be appointed as aforesaid, all expenses incurred by him in the execution of this act, such expenses being first allowed by the archbishop or

Allowance to the spiritual person.

Revenues, how to be applied.

[g] Sect. 11. [h] Sect. 12.

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lord chancellor, as the case may be; and the remainder of the said revenues, after such payments as aforesaid, and such other payment, if any, as shall be made by the bishop or the spiritual person who shall be appointed by virtue of this act, in respect of rates, taxes, tenths, salaries, pensions, repairs, insurances from fire, and other expenses incident to the administration of the temporalties, or to the exercise of the jurisdiction of the bishop or archbishop so found to be incapable, shall be paid to such bishop or archbishop, or to such other person or persons as shall be by law entitled to receive the same.[i]

Bishop or archbishop duly found to be lunatic.

If a bishop or archbishop should have been duly found a lunatic under a writ *de lunatico inquirendo*, and the inquisition should not be quashed, or the commission superseded, it is to stand in place of a report of the commissioners, and may be acted on accordingly.[k]

Provision in case of recovery or death of bishop or archbishop.

Lastly, it shall be lawful for her majesty, with the advice of her privy council, upon a petition from the bishop or archbishop so found to be incapable, a lunatic, or of unsound mind, setting forth that such incapacity, lunacy, or unsoundness of mind hath ceased, to cause inquiry to be made in such manner as to her majesty, with the advice aforesaid, shall seem fit; and if, upon such inquiry, it shall appear to her majesty that such incapacity, lunacy, or unsoundness of mind hath ceased, and that such bishop or archbishop hath become capable of again duly performing his episcopal or archiepiscopal functions, it shall be lawful for her majesty, by letters patent under the great seal of Great Britain or Ireland, as the case may be, to supersede and annul the letters patent so first issued; and thenceforward, and also in case of the death of the bishop or archbishop so found to be incapable, all powers and authorities vested in any other bishop or spiritual person, on behalf of such bishop or archbishop, shall cease.[l]

Deprivation different from deposition.

Concerning the deposing or depriving of a bishop, there is some confusion in the books; but in fact they are distinct things. Deposition implies the taking away, or putting a bishop from the office itself, or degrading him from the order of bishop; deprivation only takes from him the exercise thereof in such a particular diocese, leaving him still a bishop as much as he was before, and only vacates his promotion.

As to the former of these, the power of deposing, Dr. Ayliffe says, that by a canon of the Council of Lateran, bishops cannot be deposed by their metropolitan, without the pope's leave or licence so to do; even as a bishop

[i] Sect. 13. [k] Sect. 14. [l] Sect. 15.

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cannot, by his power alone, depose any clerk from his orders, though he may by himself give a person orders.[m]

Bishop cannot be deposed.

And Dr. Godolphin says, that the consecration of a bishop is character *indelibilis;* insomuch that, although it should so happen, that, for some just cause, he should be deprived, or removed from the see, or suspended *ab officio et beneficio,* both from his spiritual jurisdiction as to the exercise and execution thereof, and also from the temporalties and profits of the bishopric; yet he still retains the title of a bishop; for that it is supposed the order itself cannot absolutely be taken from him.[n]

But may be deprived.

But as to deprivation, Dr. Ayliffe says, that in England an archbishop may deprive a bishop, if his crime deserves so severe a punishment; and that it is said in the canon law, that a bishop who is unprofitable to his diocese ought to be deprived, and no coadjutor assigned him, nor shall he be restored again thereunto.[o]

C. J. Holt on the general power of archbishops.

And Dr. Gibson says that the archbishop has a right to deprive a suffragan bishop, and for the same refers to the case of Lucy and Dr. Watson, Bishop of St. David; which is indeed an express authority on the point, as it is related in Lord Raymond's Reports: for it is there said by C. J. Holt, "That there are archbishops who have authority over their suffragan bishops; and there are primates who are superior to them." The Archbishop of Spalata says in his book, that an archbishop has the same authority over his suffragan bishops that the bishop has over his inferior clergy; and though there may be a co-ordination *jure divino,* yet there is a subordination *jure ecclesiastico quà humano;* not of necessity from the nature of these offices, but for convenience. And for what other purpose have archbishops been instituted by ecclesiastical constitutions? The power of an archbishop was very great here in England anciently; the same jurisdiction of supremacy as the patriarchs of Constantinople, &c. The pope used to call him, *alterius orbis papam;* and he exercised the same jurisdiction with him. But afterwards, in the time of Henry I. and King Stephen, the pope usurped the authority of the archbishops; in exchange for which they became *legati nati* of the pope: and that is the reason why this practice cannot be found to have been put in use for so long a time: for when the archbishop had divested himself of his supremacy, and the pope had gained all his jurisdiction, the bishops being created by the pope, and consequently having better interest at Rome, at least as good as the archbishop, it was in vain to intermeddle.

[m] Ayl. Parer. 124. [n] 1 Burn's E. L. Bishop. [o] Ayl. Parer. 124.

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But at this day, by the act of Henry VIII., this jurisdiction is restored. It was always admitted that the archbishop had metropolitical jurisdiction, and the bishops swear canonical obedience to him; and where there is a visitatorial power, there is no reason to question the power of deprivation; for the same superiority which gives him power to pass ecclesiastical censures upon the bishops, will give him power to deprive; it being only a different degree of punishment for a different degree of offence. This appears upon the statutes 26 Hen. VIII. and 1 Eliz. c. 1, where, notwithstanding that there is not one word of deprivation, but only to visit, repress, redress, reform, correct, and amend; yet they have been construed to give a power of deprivation. "And there is no case where a person hath power of visitation, but he hath also power of deprivation. But when there was such a summary power before the high commission, it is no wonder if such a tedious proceeding before the archbishop was not used."[p] This judgment was given upon the denial of a prohibition which had been applied for by the bishop, and which was refused by the whole court. A mandamus was then moved for to order that the bishop's allegation should be admitted; but this was also refused. After the denial of the prohibition, the bishop petitioned the lord chancellor to have a writ of error upon such denial, and the chancellor, having some doubt whether it would lie or not, referred it to the attorney-general, who gave his opinion that a writ of error would lie. The writ of error was granted, and the whole record brought by the chief justice into parliament; and, upon hearing his opinion, the lords of parliament were of opinion that it would not lie. Upon which Lord Raymond says that C. J. Holt told him that if the lords had been of opinion that the prohibition ought to have been granted, he never would have granted it.[q]

This case of *Lucy* v. *Bishop of St. David's* may be taken as a most complete authority; since it appears that throughout the proceeding nothing was left undone by the bishop to prevent the deprivation. Pending the suit against him before the archbishop, he appealed to the Delegates, and then moved for a prohibition to them on divers suggestions, which prohibition, however, was refused. The Delegates overruled his appeal; and then, when the archbishop had pronounced sentence of deprivation against him, he appealed from that sentence again to the Delegates; and,

[p] See the whole judgment, from which the above is extracted, in *Episc. St. David's* v. *Lacy*, Lord Raym. R. 539.

[q] See note to the above cases, Lord Raym. R. 545.

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seeing that they would be against him, he moved again for a prohibition to stay their proceedings in the appeal, upon which occasion it was that C. J. Holt delivered the judgment of which his words quoted above are a part.[r] The bishop was obliged at last to submit to the sentence.

Mode of proceeding in depriving a bishop.

And as to the mode of proceeding in depriving a bishop, the archbishop (Tennison) in the above case called to his assistance six other bishops, with whom he held a court at Lambeth, and cited the accused bishop to appear before him, or his vicar-general, in the hall of Lambeth House, to answer, &c. To this it was objected, in one of the motions for a prohibition, that the bishop was not cited to appear in any court of which the law takes notice; but by C. J. Holt, to permit the point of jurisdiction to be disputed, would be to permit the disputing of fundamentals; for the Archbishop of Canterbury has, without doubt, provincial jurisdiction over his suffragan bishops, which he may exercise in any place of the province it shall please him; and it is not material to be in the Arches, for the archbishop is not confined to exercise his metropolitan jurisdiction there. It appears, however, that afterwards the archbishop's jurisdiction was excepted against in the House of Lords, under the pretence that he could not judge a bishop but in a synod of the bishops of the province, according to the rules of the primitive times. In answer to which it was shown, that from the ninth century downward, both popes and kings had concurred to bring this power singly into the hands of the metropolitans; that it was the constant practice in England before the Reformation; and by the provisional clause in the act of the 25 Hen. VIII. empowering a new body of ecclesiastical laws to be drawn, all former laws and customs were to continue in force till that new code was framed; which confirmed the power the metropolitan was then possessed of. Nor could the archbishop erect a new court, or proceed in the trial of a bishop, in any other way than in that which was warranted by law or precedent. To this no answer was made (nor could be made), but yet the business was kept up by the bishop's friends, and at last dropped, with an intimation that it was hoped the see would not be filled till the house was better satisfied of the archbishop's authority.[s]

Place of meeting.

Although it appears that there could be little doubt as to the legality of the proceedings of the archbishop in this case, yet it seems, that on a subsequent occasion, it was thought best to obviate any doubt upon the point last

[r] See 1 Lord Raym. R. 539.

[s] 2 Warn. 656.

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Probable established method.

raised in the House of Lords; and accordingly, in the year 1822, when it was necessary to deprive the Bishop of Clogher, the tribunal was constituted of the archbishop and the other bishops of the province;[t] and this precedent having been established, would probably be adhered to on any future occasion, notwithstanding that the archbishop alone might have full authority to deprive. Lastly, the office of a bishop may be determined by resignation; but resignation can only be made to some superior; consequently the bishop must resign to his archbishop.

Resignation.

Section 3.

Of Deans.

Office of dean derived from analogy to civil government.

The institution of deaneries, as also of the other ecclesiastical offices of dignity and power, seems to bear a resemblance and relation to the methods and form of civil government which obtained in the early ages of the Church throughout the western empire,—accordingly in this kingdom, for the better preservation of the peace, and more easy administration of justice, every hundred consisted of ten districts called tithings, and in every such tithing there was a constable or civil dean appointed for the subordinate administration of justice. In conformity to this secular method, the spiritual governors, the bishops, divided each diocese into deaneries, decennaries, or tithings, each of which was the district of ten parishes or churches; and over every such district they appointed a dean, which in the cities or large towns was called the dean of the city or town, and in the country had the appellation of rural dean.[u]

The origin of deans being thus accounted for, there is no necessity for supposing that the dean of a chapter was of old necessarily appointed to superintend ten canons or prebendaries, as Blackstone and some others have considered probable; for which supposition we have been unable to find any more certain authority; but it is probable that in the particular cases in which the name is now applied, it was transferred to those offices which appeared analogous to those to which it was originally given.

Different kinds of deans.

There are different kinds of deans: and one important distinction arising from the nature of the offices, is that of deans of spiritual promotion, and deans of lay promotion;

[t] 1 Burn's E. L. 238.

[u] Kennett's Par. Ant. 633.

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the latter of whom we may at present disregard: the former, whom we proceed to notice, may again be divided into—1. Deans of Provinces, or Deans of Bishops. 2. Honorary Deans. 3. Deans of Peculiars. 4. Deans of Chapters. 5. Rural Deans.[x] Of these we speak in their order.

Deans of provinces.

1. We have before observed, that it is a part of the dignity of the Archbishop of Canterbury that he has prelates to be his officers, and that of these the Bishop of London is his provincial dean; and this is the sole example of a dean of the first kind which we have to mention. To him as such dean, the archbishop sends his mandate for summoning the bishops of his province, when a convocation is to be assembled,[y] which is probably the origin of his being called dean of the bishops. Whether he had anciently any other office does not appear; and since the bishops have ceased to be thus convoked, his office is altogether nominal.

Honorary deans.

2. Honorary deans are such as the Dean of the Chapel Royal of St. James, who is said to be so styled on account of the dignity of the person over whose chapel he presides;[z] and the Dean of the Chapel of St. George at Windsor. But in the latter case, there being canons as well as a dean, it seems to be something more than a chapel, and, except in name, resembles a collegiate church.

Deans of peculiars.

3. Deans of peculiars have sometimes both jurisdiction and cure of souls; in which case they are considered deans of spiritual promotion; as the Dean of Battle in Sussex, which deanery was founded by William the Conqueror in memory of his conquest; and sometimes they have jurisdiction only without cure of souls, in which case they may be and frequently are deans of lay promotion. Of such kind are the Dean of the Arches, in London; the Dean of Bocking, in Essex; and the Dean of Croydon, in Surrey. These, as it is said, are only by covenant or condition, and they have a court and a peculiar, in which they hold jurisdiction of all such matters and things as are ecclesiastical, and which arise within their peculiar, which often extends over many parishes. But in speaking here of the different persons ecclesiastical, it seems unnecessary to give a more particular account of these latter kinds of deans.

Deans of chapters.

4. We now come to speak of that kind of deans which may be said to be by far the most important in our ecclesiastical polity, viz. the deans of chapters. Of which kind are the Deans of Canterbury, St. Paul's, and the like;

[x] 1 Rogers's E. L. 289. [y] Co. Litt. 95 a, n. 1. [z] Ayliffe's Parerg. 205.

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and these are ecclesiastical governors secular over prebendaries or canons in the cathedral or collegiate churches.

Rural deans.

5. Rural deans are another kind of ecclesiastical officers bearing this name; but as they have no rank with those whom we are now considering, we shall reserve the notice of them for another place.

When in episcopal sees the bishops dispersed the body of their clergy by affixing them to parochial cures, they reserved a college of priests, or secular canons, for their counsel and assistance, and for the constant celebration of divine offices in the mother or cathedral Church, where the tenth person had a presiding and inspecting power, till the senior or principal dean swallowed up the office of all the inferior, and, in subordination to the bishop, was head or governor of the whole society. His office was to have authority over all the canons, presbyters and vicars, and to give possession to them when instituted by the bishop; to inspect their discharge of the cure of souls; to convene chapters, and to preside in them; there to hear and determine proper causes, and to visit all churches once in three years within the limits of their jurisdiction. The men of this dignity were called Archipresbyters, because they had a superintendence or primacy over all the college of canonical priests; and were likewise called *Decani Christianitatis*, because their chapters were courts of Christianity or ecclesiastical judicatures, wherein they censured their offending brethren, and maintained the discipline of the Church within their own precincts.[a]

Deans of the old and of the new foundation.

Deans of chapters may be divided into those of the old and those of the new foundation; the former being such as existed prior to the Reformation; the latter created by Henry VIII. after the dissolution of the monasteries, viz. Canterbury, Winchester, Worcester, Ely, Carlisle, Durham, Rochester, and Norwich; Peterborough, Chester, Gloucester, Bristol, and Oxford; of these, the first eight were new deaneries to the bishoprics of the old foundation; the five last were deaneries to the bishoprics of the new foundation.[b]

Election formerly.

In the case of the deaneries of the old foundation, the mode of election appears to have been very variable for several reigns after the Norman conquest. But since the reign of King John, they have been elected by the chapter by *congè d'eslire* from the king, and letters missive of recommendation, in the same manner as in the case of bishops. But there was not any statute which compelled the chapter to yield to the recommendation by the pe-

[a] Kennett's Par. Ant. 634. [b] Hargrave's note to Co. Litt. 95 a.

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nalties of *præmunire* in the case of deans, as there was in the case of bishops. And in a case where a deanery was originally of private foundation, and the crown was neither patron or founder, but the appointment was by election of the chapter from among the canons residentiary, the Court of Queen's Bench, in the absence of any clear proof of the total transfer of the patronage from those to whom it was originally confided by the charter of foundation, refused a mandamus to proceed to a new election, and then elect the nominee of the crown.[c] But now it is enacted that the deanery of every cathedral and collegiate church upon the old foundation (excepting Wales) shall henceforth be in the direct patronage of the crown; and the sovereign may, upon the vacancy of any such deanery, appoint by letters-patent, and the person appointed shall thereupon be entitled to installation;[d] and the deaneries of the new foundation were always purely donative, and the installation is by the king's letters-patent.[e]

Direct patronage of deaneries of the old foundation now in the crown.

It is doubtful whether deans of chapters might formerly ever have been laymen. Such no doubt there have been, but only, as it appears, by special licence and dispensation from the king; but it was declared by statute,[f] that a person must have been ordained priest in order to qualify him for such an office; and now it is further necessary that he must have been six years complete in priest's orders.[g]

Who are qualified to be deans.

There may be deans either in cathedral or collegiate churches; but although having the office and authority, they have not always had the name of dean, as the precentor of the cathedral church of St. David, and the warden of the collegiate church of Manchester; but now these are for the future to be styled deans. There were also formerly, and there still exist, certain non-residentiary deaneries, as those of Wolverhampton, Middleham, Heytesbury, Brecon; but as these respectively fall vacant, no new nomination is to be made to them, and they are to be suppressed. The deanery and archdeaconry of Llandaff are henceforth united.[h]

Who are to be styled deans.

During a vacation the profits of a deanery go to the succeeding dean, towards payment of his first fruits.[i]

Profits during vacation.

Deans are required to preach in their cathedral or collegiate churches, and also in other churches of the same diocese where they are resident, especially in those places where they or their church receive any yearly rents or

Preaching.

[c] *Reg.* v. *Exeter, Chapter of St. Peter's*, 4 P. & D. 252.
[d] 3 & 4 Vict. c. 113, s. 24.
[e] 1 Black. Com. 382.
[f] 13 & 14 Car. 2.
[g] 3 & 4 Vict. c. 113, s. 27.
[h] 3 & 4 Vict. c. 113, ss. 1, 21, 40.
[i] 28 Hen. 8, c. 11.

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profits, or to substitute such preachers as the bishop shall think meet; and for any neglect to do so, he may be punished by the bishop.[k]

Residence of deans.

It is directed by Canon 42, that every dean shall be resident in his cathedral church four score and ten days conjunctim and divisim at the least in every year for the preaching the word of God and keeping good hospitality, unless he shall be let by weighty and urgent causes to be approved by the bishop. But every dean who is appointed to any cathedral or collegiate church after the 11th of August, 1840, is to reside for eight months at the least in every year.[l] This residence is an exemption to him from residing on any benefice he may hold, and on which he would be otherwise compelled to reside under the recent Benefice Pluralities Act; for by that act it is provided that a dean of any cathedral or collegiate church during the time that he is residing upon his deanery, and also the dean or subdean in any of the royal chapels of St. James's or Whitehall, while actually engaged in performing the duties of his office, shall be exempted from the penalties and forfeitures imposed by that act for non-residence on any benefice which he may hold; and he is entitled to count the time during which he is so resident, or engaged in performing his duties, as if he had legally resided during the same time on some other benefice.[m]

An exemption from penalties of non-residence on benefice.

Pluralities.

By the same statute a dean is prohibited from holding with his deanery more than one benefice, and from holding any preferment in any other cathedral church.[n]

Rank and dignity.

In rank and dignity a dean of this kind is next to a bishop, being in ecclesiastical records frequently styled archipresbyter, while archdeacon is *archidiaconus* only. Indeed, in some respect a dean is co-ordinate with a bishop, and the dean and chapter in some instances have a control over their bishop. A dean and chapter together as a corporation are also of higher rank than an archdeacon.

Average annual income of deans.

The average annual income of deans, notwithstanding the particular endowments of their respective cathedral or collegiate churches, have by a recent act been fixed as follows: of Durham, 3000*l.*; of St. Paul's, Westminster and Manchester, 2000*l.*; of every other cathedral or collegiate church in England, 1000*l.*; of St. David's and Llandaff respectively, 700*l.*; and the arrangement of such annual incomes, and the mode of providing for their pay-

[k] Canon 43.
[l] 3 & 4 Vict. c. 113, s. 3.
[m] 1 & 2 Vict. c. 106, s. 38. Vide post, Residence.
[n] Vide post, Pluralities.

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ment by contribution, augmentation or endowment, is left to the ecclesiastical commissioners.[o]

The holding of a canonry or other office is not now necessary to the holding the deanery of any cathedral church in England, nor to the entitling any dean to his full share of the divisible corporate revenues of such church, although such share may not formerly have been received by any preceding dean otherwise than as a canon, &c.[p]

Holding other office not necessary to entitle to income.

Section 4.

Of Deans and Chapters.

We shall further speak of the dean in connection with the chapter, for these together form one ecclesiastical corporation aggregate, of which the dean is the head. The chapter is a body of persons ecclesiastical, formerly either canons or prebendaries, and now in all cases canons, who, as we have seen, were originally selected by the bishop from among his clergy as counsel and assistants to him, and to him they are all subordinate; but like all other corporations they derive their corporate capacity from the crown. Any act done by them in such corporate capacity must be done by the dean and chapter, not by the chapter only; for it is essential to a corporation aggregate that it should have a head, without which it is incomplete.[q] Consequently, during the vacancy of the headship, they are incapable of doing any valid act except that of appointing another; and for the same reason they are, during such time, incapable of receiving a grant. But this is to be understood of an immediate grant; for if, says Lord Coke, during the vacation of the abathie of Dale, a lease for life, or a gift in tail be made, the remainder to the Abbot of Dale and his successors, this remainder is good if there be an abbot made during the particular estate.[r]

A corporation aggregate.

Vacancy of headship.

The principal duties of the dean and chapter, with respect to the bishop, are stated to be threefold: 1st, to advise and assist him in matters of religion; 2nd, to elect him on a vacancy, both of which duties may now probably be considered nominal; and 3rd, to consent to his grants, leases, &c., which is still necessary, and without which they are not binding.

Duties of a dean and chapter.

[o] 3 & 4 Vict. c. 113, s. 66; 4 & 5 Vict. c. 39, s. 2.
[p] 4 & 5 Vict. c. 39, s. 5.
[q] 1 Black. Com. b. 1, c. 18.
[r] Co. Litt. 263, 264.

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Deans and chapters have sometimes an ecclesiastical jurisdiction in several neighbouring parishes and deaneries; and this ecclesiastical jurisdiction is executed by their officials, and they have also temporal jurisdiction in the several manors belonging to them, as well as the bishops, where their stewards keep courts.

A dean and chapter have the same power to make bye laws and private statutes for the better government of their own body, as is incident to every corporation aggregate, that is to say, such statutes made by the majority are binding on themselves and their successors so long as they are not contrary to the laws of the land, or to the general policy of law. And as to the constitution of the majority, it matters not whether the dean be included in it or not; for the act of the majority is deemed the act of the whole body, that is, of the dean and chapter, although the dean may happen to be dissentient: formerly it may have been a fertile source of dispute whether the dean had any power which would be tantamount to a veto on the majority of the chapters; but such questions were set at rest by the statutes 33 Hen. VIII. c. 27, and 6 Anne, c. 21.[s]

Dean has no veto.

Nor any separate power in the corporation.

Disputes analogous to the preceding have arisen between the dean on the one hand, and the chapter on the other, regarding the right to make appointments to the choir, or to nominate to preferments belonging to the body; a case of this kind was referred to three bishops, in which the dean of Bristol and the chapter severally claimed the right to appoint the officers of the cathedral. And a similar case from Gloucester was referred to the Archbishop of Canterbury, the Master of the Rolls, and the

Warden, &c. and fellows of colleges. Power of warden, &c.

[s] Black. Comm. b. 1, c. 18, note. It may be useful to many of the clergy, who as fellows of colleges form a part of a corporation aggregate, to know that what is here said of the majority in the case of a dean and chapter is applicable also to the case of a *warden* or head, by whatever name he may be called, and fellows. Even where a negative is expressly given by the statutes to the head of any society, it is very questionable whether such statutes are not made void by the act 33 Hen. 8, c. 27. But it is in particular the usual language of college statutes to direct that many acts shall be done by *gardianus et major pars sociorum* or *magister* or *præpositus et major pars*. And it has been determined by the Court of King's Bench, and by the visitors of Clare Hall, Cambridge, and also by the visitors of Dublin College, that this expression does not confer upon the warden, master or provost any negative, but that his vote must be counted with the rest; and that he is concluded by a majority of votes against him. (See Christian's note to Blackstone, b. 1, c. 18.) The heads of some colleges, however, still contend for the power of initiating any business; and that no valid act can be done at any meeting of the society, unless proposed by the head. This power is tantamount to and even greater than a veto; and if any such should appear to be given by the statutes, it is presumed that it would be clearly void by force of the statute before mentioned, and also as being contrary to the common law of the land.

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Dean of the Arches; and in both these cases it was decided, that as in the right of making statutes, &c. the right was in the dean and chapter; and the dean being absent, in the vice-dean and chapter.[t] And even if the dean and chapter should be equally divided in numbers as to the filling up any appointment or the like, the dean has no casting vote.[u]

A statute made to bind their successors only is bad.

A statute made by the dean and chapter is to be considered as within the exceptions before mentioned, and therefore void if it were to bind their successors, and not themselves; and this is so declared by the canon law; but it would appear also to be void at common law, and this seems particularly to have been referred to by Lord Ellenborough, in the case of *Garnett* v. *Gordon*.[x]

Such statutes are not binding if contrary to the general policy of law.

The limitation above mentioned, "that statutes made by a majority are binding only so far as they are not contrary to the laws of the land, or to the general policy of law," has given rise to many cases of dispute as to the validity of such statutes.

And if contrary to the policy of the ecclesiastical establishment to be construed most strictly.

Thus in a case before the King's Bench in the year 1813, it appeared that the Bishop of Exeter, together with the chapter, had been in the habit of making private statutes; and that, by a statute so made in 1663, it was declared, that whenever any canon residentiary should cease to be such by promotion to any higher degree or dignity in the Church of England, he should nevertheless retain to his own use the profits of the canonry for the following year. The court did not find it necessary to decide whether such a statute was valid, because in the case before it the dean had ceased to be such by a voluntary resignation, in order to attain his promotion to another deanery; but Lord Ellenborough said, that such a statute was liable to powerful objections, and contrary to the policy of the ecclesiastical establishment; and at all events to be construed strictly, and, according to its very letter, unfavourably for the interests of those who had ceased to be canons: and the court therefore availed itself of the intervening resignation to decide that the dean was not entitled to the profits of the canonry which had accrued subsequently.[y]

Profits of a canonry during a vacation.

In this case the profits of the canonry spoken of were those which he had as a member of a corporation aggregate; the proper application of which during a vacation seems to be, that they should be divided among the dean and chapter.[z]

[t] Rogers's E. L. 295.
[u] Buller, J., in *Bishop of Chichester* v. *Harward*, 1 Durn. & East, 651.
[x] 1 M. & S. 205.
[y] *Garnett* v. *Gordon*, 1 M. & S. 205.
[z] Godolph. Abr. 52.

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But in the case of *The King* against *The Bishop of Durham*, hereafter mentioned, the merits of the question are stated to have been, that Dr. Sterne, the succeeding prebendary, claimed two and a half years' profits which had accrued during the vacancy of the stall from the time of the death of Dr. Benson, which profits the other prebendaries had received and divided between them. The case is reported upon other grounds, and it does not appear how the question was settled.[a] As to those profits which a canon or prebendary may have in his separate capacity as a sole corporation, it is directed by statute that they should go to his successor, toward payment of his first fruits.[b]

Visitors of deans and chapters.

It is incident to all corporations that the law has provided proper persons to visit, inquire into, and correct all irregularities that may arise in them; and, with regard to all ecclesiastical corporations, the ordinary is their visitor: so constituted by the canon law, and from thence derived to us.[c] The bishop of the diocese is consequently the visitor of every dean and chapter; but the exact limit of his power as such visitor does not seem to be very accurately defined; it would seem, however, that his visitatorial power extends no further than to the enforcing a proper performance of the duties of the Church: though we are rather furnished with authority as to what is not, than as to what is within his power as visitor.

Extent of their jurisdiction.

Thus in the case of *The King* against *The Bishop of Durham*,[d] a mandamus was applied for to compel the bishop to exercise his visitatorial authority in ordering the restitution of the profits of a vacant prebend, which had been divided among the other prebendaries during a vacation; it was considered, however, that this would be to compel him to interfere in a matter of property, as to which he could have no jurisdiction. And Lord Mansfield in that case observed, that there might be executors or representatives of deceased parties in the case, over whom the bishop could *have no pretence* to have jurisdiction, and that this alone would be decisive. A vacant canonry in the cathedral church of Chichester was not filled up, there having been two candidates for the office; and the dean and chapter, who should have made the appointment, being equally divided on the subject. In this state of circumstances, the bishop had admonished them to fill up the vacancy, and this proving ineffectual, he had cited them to appear before him to submit to his power as visitor, and to answer

[a] 1 Burrows, 204.
[b] 26 Hen. 8, c. 11.
[c] Blackst. b. 1, c. 18.
[d] 1 Burrows, 204.

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why he should not, by his power and authority, ordinary and visitatorial, fill up the vacancy, by reason that the right of so doing had devolved upon him for that time by default of the chapter in not filling up the vacancy in due time; he had then appointed a canon, and commanded the dean and chapter to admit him. Under these circumstances a prohibition was granted against the bishop by the Court of King's Bench: Mr. Justice Ashurst observing, that the person elected would be entitled to benefits which he would receive out of the funds of the church, a matter of property beyond the limits of the visitatorial authority; but he seemed to doubt, whether the bishop in such a case might not have appointed a person temporarily, and until the vacancy was filled up, so that the duties of the church might have been properly performed. But the opinion of Mr. Justice Buller seemed to be against even such a limited exercise of the visitatorial authority.[e] It follows, therefore, that there is no lapse to the bishop in the case of a prebend or canonry. It seems further from the words of Mr. Justice Buller in the above case, that if the right of election to a vacant prebend should be in the chapter, that is in the other prebendaries, they have a right to vote by proxy.[f]

Compositions.

In some particular cases the visitatorial power of the bishop over the dean and chapter is restricted by what are termed compositions, as is the case in the two ancient ecclesiastical bodies of St. Paul's and Lichfield. By the remissness and absence of the bishops of Lichfield from their see, in going to Chester, and then to Coventry, the deans had great power lodged in them as to ecclesiastical jurisdiction there, and, after long contests, the matter came to a composition in the year 1428, by which the bishops were to visit them but once in seven years, and the chapter had jurisdiction over their own peculiars. So, in the Church of Sarum, the dean has a very large jurisdiction, which is therefore probably of considerable antiquity, but upon contest, it was settled by composition between the bishop, dean and chapter, in the year 1391. And where there are no compositions, it depends upon custom, which limits the exercise, although it cannot deprive the bishop of his diocesan right.[g]

Office of the dean and chapter during vacation of the see.

The dean and chapter as a body are, of common right, guardians of the spiritualties of the bishopric during a vacation, although the archbishop now usually has that

[e] *Bishop of Chichester* v. *Harward and Webber*, 1 Durn. & East, 650.
[f] Mr. J. Buller, in *Bishop of Chichester* v. *Harward and Webber*.
[g] Burn's E. L. Dean.

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right by prescription or composition; but when the archbishopric is vacant, the dean and chapter of the archiepiscopal see are guardians of the spiritualties throughout the province.[h]

Deans of Westminster and Manchester without bishop.

In some places there is a dean and chapter where there is no episcopal see, as is the case at Westminster and Manchester, and these are called chapters of a collegiate church, as the others are called chapters of a cathedral; and some chapters there are in which formerly there was no dean, as that of St. David's, where the bishop was the head of the chapter, but now, as observed in the last section, the precentor of that cathedral has the style of dean.

Chapter without bishop or dean.

And as there may be a dean and chapter without a bishop, and a bishop and chapter without a dean, so there may also be a chapter without either bishop or dean, as is the case in the collegiate church of Southwell;[i] but in all these excepted cases the chapter retains its character and rights as a corporation aggregate, so that what has been already said of it in this respect is in all cases applicable.

Where two sees have been consolidated, what acts to be done by each chapter.

Where two sees have been consolidated, a bishop may have two chapters, or deans and chapters, as where the see of Lismore had been united to that of Waterford, in which case the chapter of Lismore only confirmed the grant of lands belonging to the see of Lismore; and in like manner the chapter of Waterford only confirmed the grant of lands belonging to the see of Waterford, and the judges held such confirmation to be good and sufficient, on the ground that it must have been so intended at the time of the union; but otherwise they held that both chapters ought to have confirmed.[k] Such double confirmation, however, appears to have been deemed unnecessary, and accordingly, in the recent union of the sees of Gloucester and Bristol, it is particularly provided that all episcopal acts requiring confirmation by the dean and chapter, are to be confirmed by the dean and chapter to whom the right would have belonged, if the sees had not been united.[l]

Ecclesiastical commission.

A considerable alteration has recently been made in the constitution of the various chapters throughout England and Wales, by the recommendation and under the sanction of the ecclesiastical commission, the nature and objects of which have been already mentioned.

[h] Godolph. Abr. 56; Rogers's E. L. [i] Rogers's E. L. [k] Godolph. Abr. 58.
[l] Order in council, gazetted on the 7th, registered on the 8th Oct. 1836, at Bristol, Blandford, and Gloucester.

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The commissioners having in the years 1835 and 1836 made four several reports with reference to the suspension of appointments to dignities and offices in cathedral and collegiate churches, an act of parliament was passed,[m] which, after reciting some material parts of these reports, declares that no appointment, presentation, or collation, should for the space of one year be made to any canonry, prebend, or dignity in any cathedral church in England or Wales then vacant, or to become vacant during the continuance of the act: provided that this should not be construed to apply to any archdeaconry or deanery, except only the deanery of Wolverhampton; nor to the dignity of precentor of St. David's; nor to any canonries of York, St. Paul's in London, Carlisle, Chichester, and Lincoln; nor to the canonries of Christchurch annexed to the regius professorships of divinity and Hebrew at Oxford; nor to the prebend in the church of Worcester annexed to the Margaret professorship of divinity at Oxford; nor to the two prebends of Westminster, which the commissioners recommended to be annexed to the parishes of St. Margaret and St. John, Westminster; nor to the fourth prebend of Durham, to be annexed to the archdeaconry of Durham; nor to the prebends in the cathedral churches of Gloucester, Norwich, and Rochester, respectively annexed to the masterships of Pembroke College, Oxford, and Catherine Hall in Cambridge; the provostship of Oriel College, Oxford; and the archdeaconry of Rochester respectively; nor to any prebend then enjoyed by the Bishops of Lincoln, Lichfield, Exeter, and Salisbury, in the chapters of their respective sees; nor to any benefice without cure of souls in the patronage of any college in either of the universities, or of any private patron; nor to any canonry of Christchurch, Oxford, by the vacancy of which the canonries would be reduced below the number of six; nor to any prebend or canonry in the chapter of any other cathedral or collegiate church in England, or royal chapel of Windsor, or the collegiate churches of Ripon or Westminster, by the vacancy of which the prebends or canonries in such chapters respectively would be reduced below the number of four; nor to any canonry in the chapter of either of the cathedral churches of Wales, by the vacancy of which the canonries in such chapters would be reduced below the number of two.

Suspension of cathedral appointments in certain cases.

The intention ultimately contemplated might have been anticipated from the exceptions above specified, which, in

[m] 6 & 7 Will. 4, c. 67.

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the cathedral and collegiate churches in England, seemed to point to four as the number of canons or prebendaries, and in Wales to two only.

With regard to the emoluments of the prebends and canonries which were thus to continue vacant, it was provided that all such profits and emoluments should, in as full and effectual a manner as if a successor had been appointed to receive the same, be paid to the treasurer of Queen Anne's Bounty, to whom were granted the same remedies for recovering the same as a successor would have had, save that he had no power to grant leases or to present to benefices.

Such treasurer was directed to keep an account of all receipts, and allow all costs, expenses, and outgoings which would have fallen on the deceased incumbent.

But it was directed that nothing in the act should affect the profits or emoluments of any dignity, &c. then vacant, which had been already divided or carried to any particular account, according to the statutes, customs, or usages of the cathedral or collegiate church in which such dignity might be founded.[n]

Permanent alterations as to deans and chapters.

As the two acts of which we have last spoken, 5 & 6 Will. IV. c. 30, and 2 & 3 Vict. c. 55, were intended to be only temporary in their operation, and have been since repealed, it does not appear to be useful to enter more fully into their provisions: neither will it be necessary to explain the recommendations of the ecclesiastical commissioners, in respect to the deans and chapters during the succeeding years. For these, so far as they have been adopted by the legislature, will appear from the provisions of the important act of parliament passed in the year 1840,[o] by which their recommendations touching cathedral and collegiate churches have with certain modifications become law.

All members of the chapter to be styled canons.

By that act it has been enacted, that henceforth all the members of chapters, except the dean, in every cathedral or collegiate church in England, and in the cathedral churches of St. David and Llandaff, shall be styled canons;[p] and subject to certain provisions contained in the act, the

Number of canons in the several chapters.

number of these canons in the several following cathedral or collegiate churches throughout England and Wales is for the future to be as follows:

[n] 5 & 6 Will. 4, c. 30, s. 3. [o] 3 & 4 Vict. c. 113. [p] Sect. 1.

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Cathedral or Collegiate Church.	Number of Canons.	Cathedral or Collegiate Church.	Number of Canons.
Canterbury	6	Manchester	4
Durham	6	Norwich	4
Ely	6	St. Paul's London	4
Westminster	6	Peterborough	4
Winchester	5	Ripon	4
Exeter	5	Rochester	4
Bristol	4	Salisbury	4
Carlisle	4	Wells	4
Chester	4	Windsor	4
Chichester	4	Worcester	4
Gloucester	4	York	4
Hereford	4	St. David's	2
Lichfield	4	Llandaff	2[q]
Lincoln	4		

The change how to be effected.

The manner in which the reduction of canons from their present number to that fixed for the future is to take place in the different chapters is as follows:

CANTERBURY.—Six canonries shall be suspended in the following order: the canonry firstly vacant shall be suspended; and the canonry now held by the Archdeacon of Canterbury, and the canonry secondly vacant, shall be subject to the provisions in the act contained[r] respecting the endowment of archdeaconries by the annexation of canonries thereto; and the canonry thirdly vacant shall be suspended, and the canonry fourthly vacant shall be filled up by her majesty; and the two canonries fifthly and sixthly vacant shall be suspended, and the then next vacant canonry shall be filled up by her majesty; and the two canonries which shall then next be vacant shall be suspended; and thereafter, upon every *fourth* vacancy among the canonries not annexed to any archdeaconry, the Archbishop of Canterbury shall appoint a canon, and all other vacancies among such last mentioned canonries shall be filled up by her majesty.[s]

DURHAM, WORCESTER AND WESTMINSTER.—Six canonries shall be suspended in the following order: the first two vacant canonries shall be suspended, and the canonry thirdly vacant shall be filled up; and the two canonries fourthly and fifthly vacant shall be suspended, and the then next vacant canonry shall be filled up; and the two canonries which shall then next be vacant shall be suspended.[t]

[q] Schedule to 3 & 4 Vict. c. 113.
[r] See post, Archdeacon.
[s] Sect. 4.
[t] Sect. 8.

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WINDSOR.—Eight canonries shall be suspended in the following order:—The first two vacant canonries shall be suspended, and the canonry thirdly vacant shall be filled up; and the two canonries fourthly and fifthly vacant shall be suspended, and the then vacant canonry shall be filled up; and the two canonries which shall then next be vacant shall be suspended, and the then next vacant canonry shall be filled up; and the two canonries which shall then next be vacant shall be suspended.[u]

WINCHESTER.—Seven canonries shall be suspended in the following order:—The two canonries secondly and thirdly vacant shall be suspended, and the canonry fourthly vacant shall be filled up; and the two canonries fifthly and sixthly vacant shall be suspended, and the next vacant canonry shall be filled up; and the two canonries eighthly and ninthly vacant shall be suspended, and the then next vacant canonry shall be filled up; and the canonry which shall then next be vacant shall be suspended.[x]

EXETER.—Three canonries shall be suspended; the canonry held in commendam with the bishopric of Exeter shall immediately upon the vacancy thereof be suspended; and the two canonries thirdly and fourthly vacant (not being either of them the canonry so held in commendam) shall be also suspended; and the canonry secondly vacant shall be subject to the provisions in this act contained respecting the endowment of archdeaconries by the annexation of canonries thereto.[y]

Bristol, Chester, Gloucester, Norwich, Peterborough, Ripon, Rochester, Salisbury and Wells.

Two canonries shall be suspended in the following order: the first vacant canonry shall be suspended; the canonry secondly vacant shall be filled up; the canonry thirdly vacant shall be suspended; the sub-deanery in the church of Ripon shall, immediately upon the vacancy, be also suspended; and at Peterborough the canonry secondly vacant shall be subject to the provisions in the act contained for the endowment of archdeaconries by the annexation of canonries thereto.[z]

ELY.—The two canonries fourthly and fifthly vacant shall be suspended.

LICHFIELD.—Two canonries shall be suspended in the following order:—The first vacant canonry shall be suspended; and the canonry annexed to the rectory of the church of St. Philip in Birmingham shall, immediately upon the vacancy thereof, be detached from the said rec-

[u] Sect. 9.
[x] Sect. 10.
[y] Sect. 11. See post, Archdeacon.
[z] Sect. 13.

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tory, and be also suspended; and this, therefore, whenever it may happen.[a]

HEREFORD.—The first vacant canonry shall be suspended.[b]

SOUTHWELL.—All the canonries, except the one held by the Archdeacon of Nottingham, as the vacancies happen, shall be suspended.[c]

ST. DAVID'S AND LLANDAFF.—All appointments to canonries shall be suspended until the number in each cathedral is reduced to two.[d]

Cases in which the above rules for suspension are not to apply.

The following cases are excepted; so that the suspension is not to take place in the order above mentioned.

CANTERBURY.—The canonry held by the Archdeacon of Canterbury.

ELY.—Any canonry which may be annexed to any professorship in the university of Cambridge.

DURHAM.—The canonry which is prospectively annexed to the archdeaconry of Durham.

WESTMINSTER.—The canonries to which the rectories of St. Margaret and St. John, Westminster, are respectively to be annexed.

GLOUCESTER.—The canonry annexed to the mastership of Pembroke College, Oxford.

ROCHESTER.—The canonries annexed to the provostship of Oriel College, Oxford, and to the archdeaconry of Rochester respectively.

NORWICH.—The canonry annexed to the mastership of Catherine Hall, Cambridge.

SALISBURY.—The canonry connected with the residentiary house called Leyden Hall.

General exception.

Also any canonry in any cathedral or collegiate church which shall hereafter, under the authority of this act, be permanently annexed to any archdeaconry or archdeaconries, or any office in the University of Durham; but if any canonry so held, annexed, or connected, or to be annexed, shall be vacant in such order, as that, according to the before-mentioned provisions, it would be one of the canonries to be suspended, the vacancy thereof shall not be counted as a vacancy subject to such provisions.[e]

All the vacancies of canonries which existed at the time of passing the act, by virtue of the act for their suspension, which has been already mentioned, were directed to be considered vacancies for the purposes before mentioned,

[a] Sect. 13. [b] Sect. 14. [c] Sect. 18.
[d] Sect. 19. [e] Sect. 15.

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and to be counted for these purposes in the numerical order in which they had happened.[e]

One suspended canonry may be filled up to endow archdeaconries.

In any cathedral church in which, by the suspension of canonries, the number of canons shall be reduced to four, one of such suspended canonries may, if it be deemed necessary for the purpose of endowing any archdeaconry or archdeaconries, be filled up, subject to the provisions in the act contained respecting the endowment of archdeaconries by the annexation of canonries thereto.

Power to remove the suspension from canonries under special circumstances.

The suspension of these canonries might rather be called a suppression of them, as it will ordinarily be complete and final; but it is nevertheless provided that a plan may from time to time be laid before the ecclesiastical commissioners for England by any of the said chapters of the several cathedral and collegiate churches, with the sanction of the visitors of the said churches respectively, for removing the suspension from and re-establishing any canonry or canonries which shall have been suspended by or under the provisions of the act, by assigning, towards the re-endowment of any such canonry or canonries, a portion of the divisible corporate revenues remaining to the said chapters respectively, after paying to the said ecclesiastical commissioners the profits and emoluments accruing to the said commissioners from the suspended canonry or canonries; so that the profits and emoluments of such suspended canonry or canonries be not diminished by the removal of such suspension; and also by accepting and assigning for the same purpose any further endowment in money, or in lands, tithes, or other hereditaments, such lands, tithes, or other hereditaments, not exceeding in yearly value the sum of 200*l.* for each canonry from which the suspension shall have been so removed; and also by annexing to any such canonry, from which the suspension shall have been so removed, any suitable benefice or other preferment in the patronage of the said chapters respectively, or of any other patron, with the consent of such patron, and where any bishop is patron, with consent of the archbishop; and any such plan may be carried into effect by the authority in the act provided,[f] and such alterations may be made in the existing statutes and rules of the said chapters respectively as the case may require, under the authority in the act provided for making alterations in existing statutes.[g]

Two of the canonries of Westminster are henceforth for

[e] Sect. 15. [f] See ante, Ecclesiastical Commission. [g] Sect. 21.

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ever to be annexed to the rectories of St. Margaret's and St. John's, in that parish.

With regard to the right to any part of the property of the chapter, it is declared that no presentation, collation, donation, admission, election, or other appointment to the dignity or office of subdean, chancellor of the church, vice-chancellor, treasurer, provost, precentor, or succentor, nor to any prebend not residentiary in any cathedral or collegiate church in England, or in the cathedral churches of St. David and Llandaff, or in the collegiate church of Brecon, shall convey any right or title whatsoever to any lands, tithes, or other hereditaments, or any other endowment or emolument whatsoever now belonging to such dignity, office or prebend, or enjoyed by the holder thereof in right of such dignity, office or prebend, or any part thereof; provided that this shall not be construed to deprive any present or future holder of any office in any cathedral or collegiate church, actually performing duties in respect of such office, of any stipend or other emolument heretofore accustomably assigned to such office, or paid to the holder thereof, according to the statutes of such church, out of the revenues thereof.[h]

Non-residentiary prebends, &c. not to give right to any endowment.

In every cathedral or collegiate church wherein there exists any statute or custom for assigning to the dean or to any canon any land, tithes, or other hereditaments, in addition to his share of the corporate revenues, or for appropriating separately to the dean or any canon during his incumbency the proceeds of any land, tithes, or other hereditaments, part of the corporate property of the chapter, every such statute and custom, or every such part thereof, as relates to such assignment or appropriation, shall be repealed and annulled as to all deans and canons hereafter appointed: provided nevertheless that any small portion of land, situate within the limits and precincts of any cathedral or collegiate church, or in the vicinity of any residentiary house, may be reserved to such church, or permanently annexed to such residentiary house, by the authority in the act provided.[i]

Statutes and customs for appropriating separate estates repealed.

As to the revenues of the Chapter of Durham, it is provided that so soon as conveniently may be, such arrangements shall be made with respect to the deanery and canonries in the cathedral church of Durham and their revenues, as upon due inquiry and consideration of an act passed in the second year of the reign of his late majesty, intituled, "An Act to enable the Dean and Chapter of Durham to appropriate part of the Property of their

Provision for the University of Durham out of revenues of the Chapter.

[h] Sect. 22. [i] Sect. 28; and see Ecclesiastical Commission.

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Church to the Establishment of an University in connexion therewith for the Advancement of Learning," and of the engagements entered into by William, late Bishop of Durham, and the dean and chapter of Durham, shall be determined on, with a view to maintaining the said university in a state of respectability and efficiency; provided that in such arrangements due regard shall be had to the just claims of any existing officer of the said university.[k]

Provision for the Chapter of St. David's.

The canonries at St. David shall be in the direct patronage of the Bishop of St. David's; and so soon as conveniently may be, the canons may be respectively instituted or licensed, as the case may be, to the cure of souls in the parish of St. David; and the whole divisible corporate revenues shall be divided into twenty-four parts, ten of which parts shall be assigned to the dean, and five to each canon, and the remaining four parts shall be assigned as an endowment to the archdeacon of Cardigan.[l] And so soon as conveniently may be, the canons of Llandaff may be instituted or licensed, as the case may be, to the cure of souls in the parishes of Llandaff and Whitchurch respectively; and, after the reservation to the Lord Bishop of Llandaff of one seventh part (being his present share) of the whole divisible corporate revenues, the remainder thereof shall be divided among the three members of the chapter, in the proportions of half to the dean, and one quarter to each of the canons.[m]

And of Llandaff.

And of Brecon.

Due provision is henceforth to be made out of the endowments belonging to the prebends in the collegiate church of Brecon for the archdeaconries of Brecon and Carmarthen.

Separate patronage of members of the chapter vested in the bishop.

Restrictions and alterations are imposed and made by the act upon and in the right of patronage, whether vested in the individual members of the chapter separately or in the chapter collectively; the patronage of the individual members is taken away, and transferred, for it is declared that the patronage of all benefices with cure of souls, possessed by deans, and other individual members of chapters, in right of any separate estates held by them as such members, or possessed by prebendaries, dignitaries, or officers not residentiary, in right of their prebends, dignities, or offices respectively, shall be transferred to and vested in the respective bishops of the dioceses in which the benefices shall be respectively situate: provided, with respect to any benefice now or heretofore possessed by any dean, in right of any separate estate held by him as such dean, that every future dean of the same deanery may, upon any vacancy

[k] Sect. 37. [l] Sect. 38. [m] Sect. 40.

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of such benefice, present himself thereto. That with respect to benefices in the patronage of the prebendaries of the collegiate church of Southwell, the same shall, as soon as conveniently may be, be transferred, so as to become vested, as the prebends fall in respectively, partly in the Bishop of Ripon and partly in the Bishop of Manchester, in such proportion as shall be determined on; and upon the vacancy of any such last-mentioned benefice, before the patronage thereof shall have been so transferred, it shall be lawful for the Bishop of Ripon for the time being to present thereto.°

Patronage of the chapter generally.

The patronage of the chapter is restricted only, it being directed that upon the vacancy of any benefice in the patronage of the chapter of any cathedral or collegiate church, the chapter shall present or nominate thereto either a member of such chapter or one of the archdeacons of the diocese, or a non-residentiary prebendary or honorary canon, as the case may be, or any spiritual person who shall have served for five years at the least in the office of minor canon or lecturer of the same church, or of master of the grammar or other school (if any) attached to or connected with such church, or as incumbent or curate in the same diocese, or as public tutor in either of the Universities of Oxford and Cambridge; or who, so far as relates to the cathedral church of Durham, shall have served for the like term in the office of professor, reader, lecturer, or tutor in the said University of Durham, or shall have been educated thereat, and shall be a licentiate or graduate in theology therein, or who shall have served as incumbent or curate within the same diocese for the period aforesaid; and that every such office of minor canon, lecturer, schoolmaster, professor, reader, lecturer, or tutor, shall immediately, upon the expiration of one year from the time of his institution to such benefice, if not previously resigned, become and be vacant; and that if neither a member of the chapter nor an archdeacon of the diocese, nor a minor canon nor lecturer, nor such schoolmaster, incumbent or curate, professor, reader, lecturer, tutor, licentiate, or graduate, as the case may be, shall be presented or nominated to such benefice within six calendar months from the time of the vacancy thereof, the bishop of the diocese in which the same is situate may, within the next six calendar months, collate or license thereto any spiritual person who shall have actually served within such diocese as incumbent or curate for five years at the least; and if no such collation or license shall be granted within such time, the right of

On whom it may be conferred.

° Sect. 41.

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presentation or nomination to such benefice for that turn shall lapse to the archbishop of the province.[p]

Profits of suspended canonries to be paid to and their estates vested in the commissioners.

All profits and emoluments of each and every canonry suspended as before mentioned, whether consisting of or arising from rents, fines, compositions, dividends, stipends, or other emoluments whatsoever, as to every such canonry vacant at the passing of the act, and as to every other immediately upon and from the vacancy thereof, are directed from time to time to be paid to the ecclesiastical commissioners for England, in like manner as the holder of such canonry, if he had remained in possession, or the successor thereto, if a successor had been appointed, and had duly qualified himself by residence and otherwise, according to the statutes and usages of his church, to receive his full portion of the emoluments thereof, would have been entitled to receive the same; and all the estate and interest (if any) which such successor would have had in any lands, tithes and other hereditaments (except any right of patronage) annexed or belonging to or usually held and enjoyed with such canonry, or whereof the rents and profits have been usually taken and enjoyed by the holder of such canonry as such holder separately, and in addition to his share (if any) of the corporate revenues of such chapter, as to all vacancies subsisting at the passing of this act, and as to all others immediately upon such vacancies respectively, is to accrue to and be vested absolutely in the ecclesiastical commissioners for England and their successors, without any conveyance or any assurance in the law, provided that the profits and emoluments arising from corporate revenues belonging to the canonries suspended in the chapters of the cathedral churches of Chester, Lichfield and Ripon respectively, shall become, as the vacancies occur, part of the divisible corporate revenues of the said chapters respectively: provided also that this shall not be construed to affect the right of any chapter, according to the statutes or customs of such chapter in force at the passing of this act, to make due provision out of the divisible corporate revenues for the maintenance of the fabric, the support of the grammar school (if any), and all other necessary and proper expenditure.[q]

Proviso for the fabric fund.

Commissioners may in certain cases contribute to fabric fund.

In any cathedral church on the old foundation, in which any contribution to the fabric fund of such church has heretofore, either usually or occasionally, been made out of the rents, profits or proceeds of any lands, tithes or other hereditaments so vested or to be vested in the ecclesiastical commissioners for England, it shall be lawful for

[p] Sect. 44. [q] Sect. 49.

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the commissioners to contribute to such fund such sum as they shall deem necessary out of the rents, profits or proceeds of the same lands, tithes or other hereditaments, not exceeding in amount the proportion of such rents, profits or proceeds which has usually been applied to like purposes.[r]

Appropriation of residence-houses not wanted.

So soon as conveniently may be, measures shall be taken by the deans and chapters of the several cathedral and collegiate churches for the disposal of such residence-houses now under their control, and houses attached to any dignity, office or prebend, in the precincts of the respective cathedral or collegiate churches as may no longer be required, in such way as they shall deem fit, according to plans to be from time to time prepared by the respective chapters, and, when approved by the visitors, to be submitted to the commissioners to be confirmed by them and by order of the queen in council.[s]

Chapter, or visitors in their default, may propose alterations in their statutes.

The chapters of the several cathedral and collegiate churches shall from time to time, of their own accord, or upon being required by the visitors of the said churches respectively, propose to such visitors such alterations in the existing statutes and rules as shall provide for the disposal of the benefices in their patronage, so as to meet the just claims of the minor canons of such churches, and so as shall make them consistent with the constitution and duties of the chapters respectively, as altered under the authority of the act; and all such alterations, if approved, may be confirmed by the authority of such visitor; and in any case in which such alterations shall not be approved, or in which such requisition shall not be complied with within twelve calendar months, the visitor shall be at liberty of himself to make the necessary alterations; and all such statutes and rules, when so altered, shall be submitted to the commissioners, and may be confirmed by the order of the queen in council; and as to any alteration made by a visitor alone, the commissioners shall communicate a draft thereof to the chapter to be affected thereby, and shall, together with any scheme to be prepared by them, lay before her majesty in council such remarks as may within three months have been made thereon by such chapter; and out of the proceeds of the suspended canonries in any chapter, provision may from time to time be made for relieving the present canons of such chapter from the performance of any additional duty, by reason of such suspension, by the employment of substitutes to be approved by the respective bishops: provided that nothing herein con-

[r] Sect. 53. [s] Sect. 58.

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tained shall be construed to affect any existing right of chapters with their visitors to make statutes.[t]

Section 5.

Of Canons.

Canon a corporation sole.

Having spoken of the dean and chapter as members of a corporation aggregate, we proceed to speak of the canons or prebendaries individually, of whom such chapters are composed; for it must be remembered that as the canons collectively, with the dean, form a corporation aggregate, so each individually, in respect of his office, is a corporation sole.

Prebendary, meaning and origin of the term.

A prebendary, according to Lord Coke, is so called a *præbendo*, from the assistance he affords to the bishop,[u] and, if this derivation could be supported, it would go far to explain the original purpose of the office; but, as in the case of many other derivations of that celebrated author, its correctness may be doubted; and it has been said with at least as much apparent reason, that a prebend is an endowment in land, or a pension in money, given to a cathedral or conventual church in *præbendum*, that is, for the maintenance of a priest or canon, who was called a prebendary, as supported by the said prebend.[x]

Two kinds of.

Prebendaries are of two sorts, simple and dignitary; a simple prebendary is one who has no cure, and has no more than his prebend for his support; whereas a dignitary prebendary has a jurisdiction always annexed, he is therefore called a dignitary, and his jurisdiction is gained by prescription;[y] and a prebendary generally may be said to be one who has a stall in the choir and a voice in the chapter.

Are now styled canons.

We have thus far used the word prebendary only for the sake of alluding to its derivation, for in fact the term is now extinct, and every member of the chapter, in every cathedral church in England, is henceforth to be styled a canon.[z]

Patronage of canonries.

The bishop was always considered of common right to have the patronage of canonries; but formerly there existed several exceptions: now, however, it appears that there is no longer any private patronage in such cases, but the appointment to all canonries is vested either in the bishop of the diocese or in the crown. There can therefore be no

[t] Sect. 47. [u] Rep. 756. [x] Gibs. 195; 2 Burn's E. L. 88.
[y] 2 Burn's E. L. 88. [z] 3 & 4 Vict. c. 113, s. 1.

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longer any institution in the case of canons newly appointed; but where the bishop is patron he collates, and the dean and chapter induct by placing the new canon in a stall in the church to which they belong. In those cases where the patronage is in the king, he appoints by letters-patent; whereupon the person appointed is entitled to installation at once, as it seems, without collation.[a] And formerly, where the canons were elected by the chapter, a mandamus was granted to compel an election to fill a vacancy; and it was said that such was the proper mode of proceeding, for that the authority of the bishop was insufficient for that purpose:[b] but such cases could not now occur.

Collation and installation.

Whether a peremptory mandamus would be granted to admit a canon to his stall and voice, seems to have been thought more doubtful; and certainly none lies to restore a canon who has been deprived by sentence of the visitor.[c]

Mandamus to compel installation.

If a prebendary accepts a deanery, his prebend is void by cession, and so if he be made a bishop; and in both these cases the king presents to the prebend thus made vacant.[d] Nor would this, as it seems, be altered by the recent statutes, which expressly give the patronage of certain canonries to the bishop of the diocese.

Patronage when the canon is made a bishop.

No person is qualified to be appointed canon until he has been six years complete in priest's orders, except in the case of a canonry which is attached to a professorship, headship, or other office in any University.[e]

Qualification.

Canons are bound to preach in their cathedral or collegiate churches, and in other churches in the diocese, just as we have already seen in the case of deans. But they have not the cure of souls; for which reason he who takes title to a canonry is not obliged to read or subscribe the Thirty-nine Articles; and for the same reason a canonry and a parochial benefice might formerly have been holden together without any dispensation. But now no spiritual person holding more than one benefice shall accept, or take to hold therewith, any cathedral preferment or any other benefice; and no spiritual person holding any cathedral preferment, and also holding any benefice, may accept or take to hold therewith any other cathedral preferment, or any other benefice; and no spiritual person holding any preferment in any collegiate or cathedral church, shall accept or take to hold therewith any preferment in any other cathedral or collegiate church, any law, canon, custom or usage to the contrary notwithstanding; but this does not

Duties.

How affected as to pluralities.

[a] 3 & 4 Vict. c. 113, ss. 34, 35. [b] 1 T. Rep. 652. [c] 1 Wils. 206.
[d] 2 Burn's E. L. 87. [e] 3 & 4 Vict. c. 113, s. 27.

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extend to prevent a person holding any cathedral preferment, either with or without a benefice, from holding therewith any office in the same cathedral or collegiate church, the duties of which are statutably or customarily performed by the spiritual persons holding such preferment; and a further exception from this rule is made in favour of an archdeacon, which we shall mention when we speak of that dignitary.[f]

Previously to this enactment it was the rule that no person could hold more than one canonry in the same church, which, as it is said, was agreeable to the rule of the ancient canon law; but as to canons in different churches there was not the same restriction.[g]

Residence of canons on their benefices.

By the canon law also it was provided that no prebendaries nor canons in cathedral or collegiate churches, having one or more benefices with cure, (and not being residentiaries in the same cathedral or collegiate churches,) should, under colour of their said prebends, absent themselves from their benefices with cure above the space of one month in the year, unless it was for some urgent cause and certain time to be allowed by the bishop. And that such of the said canons and prebendaries as, by the ordinances of the cathedral or collegiate churches, stood bound to be resident in the same, should so among themselves sort and proportion the times of the year as that some of them always should be personally resident there; and that all residentiaries should, after the days of their residency appointed by their local statutes or customs expired, presently repair to their benefices, or some or one of them, or some other charge, where the law required their presence, there to discharge their duties according to the laws in that case provided; and that the bishops of the diocese should see the same to be duly performed and put in execution.[h]

Formerly regulated by the canon law.

Now by statute.

A further provision regulating the residence of prebendaries was made by the statute 59 Geo. III. c. 99, s. 11, but it appears unnecessary now to mention it, since the matter is now regulated by the recent act 1 & 2 Vict. c. 106, which makes it lawful for any spiritual person, being prebendary, canon, priest, vicar, vicar choral or minor canon, in any cathedral or collegiate church, who shall reside and perform the duties of such office during the period for which he shall be required to reside and perform such duties by the charter or statutes of such cathedral or collegiate church, to account such residence as if he had resided on some benefice; but this is not

[f] 1 & 2 Vict. c. 106, s. 2; and see title Pluralities.
[g] Gibs. 174.
[h] Canon 44.

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to be construed as permitting or allowing any such prebendary, canon, &c. to be absent from any benefice, on account of such residence and performance of duty, for more than five months altogether in any one year, including the time of such residence on his prebend, canonry, &c.; and every such spiritual person holding any such office in any cathedral or collegiate church, in which the year for the purposes of residence is accounted to commence at any other period than the 1st of January, and who may keep the periods of residence required for two successive years at such cathedral or collegiate church, in whole or in part, between the 1st of January and the 31st of December in any one year, may account such residence, although exceeding five months in the year, as reckoned from the 1st of January to the 31st of December, as if he had resided on some other benefice.[i]

Term of residence on canonry.

The actual term of residence to be kept by every canon is now appointed to be three months at the least in every year. It seems, therefore, that an incumbent who also holds a canonry is allowed in each year two months' term of absence from his benefice, besides the time of his necessary residence as canon.[k]

Right of advowson attached to a prebend.

It not unfrequently happened that the advowson of a rectory was attached to a prebend; and in such case, where the prebendary died after the church had become vacant, and before presentation, it has been a matter of much controversy whether the right to present devolved upon his executor or upon his successor; and in the first instance it was decided that, because it was a spiritual trust reposed in the prebendary in right of his ecclesiastical benefice, it could not devolve upon the executor, since none could exercise the right who was not clothed with the ecclesiastical character in respect of which the right accrued.[l] But this decision, pronounced in the Court of Common Pleas, was brought before the King's Bench by writ of error, and there seems to have been most fully argued and considered; and there it appears to have been considered that the right of presentation of a prebendary, in right of his prebend, was not inalienable or inseparable on account of a personal trust and confidence in the person who might happen to be prebendary; that the intention of the particular donor could not be relied on; that the right of presentation was a chattel, and that it was against the known rule of law that any corporation sole, except the king, could take a chattel by succession. It was consequently decided that

[i] 1 & 2 Vict. c. 106, s. 37.
[k] 3 & 4 Vict. c. 113, s. 3.
[l] *Rennell* v. *Bishop of Lincoln*, 3 Bing. 223.

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the right vested in the prebendary, not in his corporate, but in his individual capacity, and devolved upon his personal representatives; and the decision of the Court of Common Pleas was reversed.[m] The same case was again brought before the House of Lords, when the decision of the King's Bench was confirmed by the opinion of six judges to one, the dissentient, however, being Lord Lyndhurst.[n]

No right of patronage or separate estate in canons individually.

But this question, and the above decision on it, are now rather subjects of history than of law; for as it has been said in the last chapter, all the patronage of the canons individually has been taken from them, and transferred to the bishops.

And all the separate estate and interest which the holder of any canonry has or would have in any lands, tithes, or other hereditaments or endowments whatsoever, annexed to or usually held with his canonry, in addition to his share of the corporate revenues of the chapter, is now absolutely vested in the ecclesiastical commissioners.[o]

Income, amount of, and how paid.

Henceforth, therefore, the only income of a canon is that which he shares with the other members of the chapter, out of the revenues of the chapter; but in most cases a part only of the former revenues of the chapter is applicable for this division; for the ecclesiastical commissioners are to make such arrangements in this respect as will leave to the canons of Durham, Manchester, St. Paul's and Westminster respectively, an average annual income of 1000*l.* And such other arrangements are to be made by the commissioners, either by addition to, or deduction from, the amount of the average annual income of the canons in every other cathedral or collegiate church in England, as will leave the average income at 500*l.*, and in the cathedral church of St. David's and Llandaff at 350*l.*[p] But this scale of payments and receipts may from time to time be revised or varied; but so as to preserve as nearly as possible the intended average annual incomes; and so as not to affect any canon in possession at the time of making any such variation.[q]

Whether the income of a canon as now paid could be assigned as a valid security.

It is a question of considerable importance, but one which cannot yet be said to have been fully decided, whether those profits of a canonry, which the canon has in his capacity as a member of the chapter, and now therefore his only income, can legally and validly be assigned by

[m] *Rennell* v. *Bishop of Lincoln*, 7 Barn. & Cress. 117.
[n] *Mirehouse* v. *Rennell*, 1 Clark & Fin. 527.
[o] See last chapter.
[p] 3 & 4 Vict. c. 113, s. 66. [q] 4 & 5 Vict. c. 39, s. 20.

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him, so that the assignee could enforce payment of them to himself. The solution of this question seems to depend on principles which have a much more extensive application, than to the case immediately before us, and which it would therefore be beyond the scope of this work to discuss. But in a case of a somewhat similar kind, where a fellow of King's College at Cambridge had assigned his fellowship, and the assignee applied to the vice-chancellor to have a receiver appointed, and for an injunction against the provost and scholars, and to restrain them from paying over the dividends, the application was dismissed with costs.[r]

Cases upon this point.

On a fieri facias against Warburton, a fellow of Winchester College, the sheriff returned that he is a clergyman beneficed, having no lay fee. Hereupon a fieri facias was issued to the bishop to levy the same of his ecclesiastical goods. The bishop sent his mandate to the warden and fellows of the college, to sequester his salary. They answer that they have not power to do it. The bishop moved the court to know whether he might compel them by ecclesiastical censures. By Holt, C. J. "If a prebendary hath a sole body, the bishop, upon a levari facias of his ecclesiastical goods, may sequester it; but if he hath but a body aggregate with the dean and chapter, he cannot sequester it. In this case the profits of the fellowship are but casual dividends, in which before division Warburton hath no interest, so that they do not make an estate; and it seems in this case Warburton is not a clerk beneficed, and the bishop may return that he hath no ecclesiastical goods."[s]

The following decision, on the other hand, was given by Lord Langdale at the Rolls; but the above cases do not appear to have been cited in the argument, and the judgment can scarcely be taken to have decided the question; regard being had to the special circumstances of the case, the language of the judgment, and the expressed intention of appealing.

Musgrave, one of the canons of Windsor in the year 1838, had assigned to Grenfell all the annual income, &c. to which as one of such canons he was entitled; it appeared that the income arose from estates possessed by the corporation, the rents and proceeds of which were usually divided half-yearly between the dean and twelve canons; but it did not appear that there was any property vested in the dean and canons independently of the corporation. There did not appear to be any spiritual duties attached to the office, nor any cure of souls, but it was represented

[r] Lib. Reg. 6th Aug. 1830. [s] 3 Burn's E. L. 201.

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that the corporation was governed by certain statutes and ordinances, whereby certain duties were imposed upon the members of the said corporation, to be by them performed, each member of the said corporation having the privilege of residing in a house within the walls of the Castle of Windsor; and that if any member of the corporation failed to perform his appropriated duties, he, by virtue of the said statutes and ordinances, forfeited his right to share in the division of the surplus income of the said corporation; and in lieu thereof was entitled to receive a small fixed stipend of the amount of 25*l.* a year only; and that the members of the corporation were in such cases entitled to the residue of his share of the surplus income of the corporation. That one of the duties by the said statutes and ordinances imposed upon each of the said canons was, to reside in one of the said houses within the walls of the Castle of Windsor, and to attend divine service in the chapel of St. George, at Windsor, twenty-one days in each year. Such being admitted to be the state of things, Musgrave had made default in payment of the interest of the debt, to secure which the profits of the canonry had been assigned, and Grenfell, having filed his bill for the purpose of obtaining payment, and to restrain the dean and canons from paying, and Musgrave from receiving the income of the canonry, had obtained such injunction accordingly, and a receiver had been appointed. Musgrave moved to discharge the injunction, on the ground that the profits of a canonry were not assignable, such an assignment being contrary to the policy of law; and also because the assignee could not perform those duties on the non-performance of which the income would be forfeited. On the latter of these arguments it was said by the Master of the Rolls, "It cannot be supposed that Mr. Musgrave will be so unwise as, rather than give the plaintiff the benefit of that which he is clearly entitled to, wholly to neglect to perform the duty which entitles him to the receipt of this income, and thus leave the debt standing, and the interest accumulating upon it. I cannot presume that any such degree of absurdity will mark his future conduct." As to the argument that the assignment was contrary to the policy of law, he said, "if it had been made out that the duty to be performed by Mr. Musgrave was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various duties in which it may be against public policy that the income arising for the performance of those duties should be assigned; because the public is interested not only in

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the performance from time to time of those duties, but also in the fit state of preparation of the party having to perform them. If in this case the residence in Windsor Castle, and the attendance on divine service, had been stated in the answer, or in any way shown to be for the benefit of the public, or the maintenance of the dignity of the sovereign for the benefit of the public, I should have thought the case worthy of a very different consideration; but from all that is stated in the answer that is not the case; it is a service to be performed for the benefit of the party himself; and therefore, upon the case as it now stands upon this answer, and without saying that there may not be other facts which may be material to be ultimately considered, it appears to me that the security of the plaintiff is valid." The motion was therefore refused with costs.[t]

It is believed that this decision would have been appealed against had not the decease of Mr. Musgrave prevented such a course from being adopted; as it is, however, it seems to contain all that can be said with any certainty upon the subject. It appears from it, that an assignment of such ecclesiastical preferment generally is not contrary to public policy; and that there must be some special circumstances in the case in order to render such an assignment invalid; but if the payment of profits were made to depend on the performance of certain duties, and these were not performed by the assignor, the assignee, as it seems, would be quite unable in any way to enforce his security.

An action by another mortgagee was brought in the Court of Common Pleas against Mr. Musgrave, the same party as in the above case; and it was there decided that an action of ejectment would not lie for the canonry in question, it being a mere office of which the sheriff could not give possession, and that ejectment did not lie for the residentiary house in which the canon resided, as it appeared vested in the corporation, and not in the crown.[u]

It does not appear that the alteration as to canonries generally, or the new arrangements as to their annual income, would have any effect upon this question. And, notwithstanding the decision of Lord Langdale, it must still be considered a very doubtful question, whether such an interest as that of a canon in his canonry could be assigned, so as to make any valid security to the assignee.

Honorary canonries.

Provision has recently been made for the creation of a new kind of canonry, and a dignity hitherto unknown in our ecclesiastical establishment, for by the statute 3 & 4

[t] *Grenfell* v. *Canons of Windsor*, 2 Beavan, 544. [u] Same case, note.

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Vict. c. 113, after reciting that it is expedient that all bishops should be empowered to confer distinctions of honour upon deserving clergymen, it is enacted that honorary canonries shall be thereby founded in every cathedral church in England, in which there are not already founded any non-residentiary prebends, dignities, or offices; and the holders of such canonries shall be styled honorary canons, and shall be entitled to stalls, and to take rank in the cathedral church next after the canons, and shall be subject to such regulations respecting the mode of their appointment, and otherwise, as shall be determined on by the confirmed recommendations of the ecclesiastical commissioners, and with the consent of the chapters of the said cathedral churches respectively.[x]

The number of honorary canonries thus founded in each cathedral church is fixed at twenty-four, and the appointment is with the bishops and archbishops respectively.

It was declared that any number, not exceeding eight, might be appointed in each diocese in the year next after the passing of the act (1841), after which time two only might be appointed in each year, until the number was filled up, except in the case of a vacancy among those already appointed, in which case his place also might be filled up.[y]

These honorary canons have no emolument whatever, nor are they to take or hold any place in the chapter by virtue of their appointment.

Where founded.

The following are the cathedral churches in which only these honorary canonries are founded:—Canterbury, Bristol, Carlisle, Chester, Durham, Ely, Gloucester, Norwich, Oxford, Peterborough, Ripon, Rochester, Winchester, Worcester and Manchester, as soon as this last becomes a cathedral church.[z]

Not accounted as cathedral preferment.

These honorary canonries are not to be considered as cathedral preferment, so as in any way to prevent or affect the holding other benefices with them under the provisions against holding plurality of benefices. Neither are they subject to lapse, so that there is no obligation to the bishop to fill them up as vacancies occur, unless he may think proper to do so.[a]

Minor canons.

Of the origin of minor canons there does not appear to be anything that may be said with certainty; but as well from the name itself, as from other names given to similar offices in different places, it appears that they were a sort of deputy appointed to perform the cathedral duties in the

[x] 3 & 4 Vict. c. 113, s. 23.
[y] 3 & 4 Vict. c. 113, s. 23.
[z] 4 & 5 Vict. c. 39, s. 2.
[a] Sect. 3.

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absence or in exoneration of the canons or prebendaries, by whom they were usually appointed. Thus we find the terms vicar, vicar choral, priest vicar, and senior vicar, signifying the holders of offices similar to the minor canonries; the word vicar, as we shall hereafter see, always meaning a substitute, and commonly applied to the person appointed to perform the duties for the rector or parson of a benefice.

By whom appointed.

Henceforth the right of appointing minor canons is in all cases vested in the respective chapters,[b] except in cases where the appointment has formerly been in the dean, in which case the act makes no alteration; but the right of appointment remains with the dean, and his successors, as before,[c] and is not to be exercised by any other person or body whatsoever; and regulations were by the statute 3 & 4 Vict. c. 113, directed to be made by the confirmed recommendations of the ecclesiastical commissioners, for fixing the number and emoluments of such minor canons in each cathedral or collegiate church. But the number is not in any case to be more than six nor less than two.

Number of.

Their stipend.

The stipend of any minor canon appointed after the passing of that act is to be not less than 150*l.* per annum, and arrangements were also by the same act authorised to be made for securing to a minor canon already appointed, and not otherwise competently provided for, an income not exceeding 150*l.* per annum.[d]

How affected as to pluralities.

The office of minor canon, priest vicar or vicar choral, having any emolument attached to it, is within the meaning of the term cathedral preferment in the Benefice Pluralities Act;[e] and no minor canon appointed after August, 1840, may take or hold, together with his minor canonry, any benefice beyond the limits of six miles from the cathedral or collegiate church where he holds such appointment; but he is not prevented from holding any benefice within such distance.[f]

Minor canons are among those in favour of whom the exercise of the right of patronage by the chapters is restricted, and in whose favour therefore the right may be exercised.[g]

[b] 3 & 4 Vict. c. 113, s. 45.
[c] 4 & 5 Vict. c. 39, s. 15.
[d] 3 & 4 Vict. c. 113, s. 45.
[e] 1 & 2 Vict. c. 106.
[f] 3 & 4 Vict. c. 113, s. 46; and 4 & 5 Vict. c. 39, s. 15.
[g] 3 & 4 Vict. c. 113, s. 44.

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Section 6.

Of Archdeacons.

Origin of.

Deacons were all originally the attendants and assistants of the bishop in Church affairs, and at a very early period in the history of the Church, there was one chosen out from the rest in several dioceses, to whom was given the title of archdeacon. This office by degrees became universal, though it had relation only to the episcopal see. The duties of their office were, to attend the bishop at the altar and at ordinations, to direct the deacons in their several duties, and to assist the bishop in the management of the revenues of the Church. But from thus being mere assistants, they began in process of time to share with the bishop in his authority, and by several steps and degrees they attained to the power they now enjoy.[h]

Their powers how acquired.

Of common right it seems that archdeacons have no power to usurp to themselves greater matters, but only to report the same to the bishops. Beyond this, all the rights that any archdeacon enjoys, of what kind soever they may be, subsist by grants from the bishops, either made voluntarily, to enable archdeacons to visit with greater authority and effect, or of necessity, as claimed and insisted on by archdeacons, upon the foot of long usage and custom. But whatever might have been the motive for these concessions on the part of the bishops, it seems that the powers enjoyed by archdeacons beyond those which they claim of common right, accrued to them by express grant or composition; it being hard to imagine how deans and chapters, archdeacons, or any other persons, should be allowed to prescribe against a bishop for any branches of episcopal jurisdiction, and much more for an exemption from it.[i]

Shortly after the Norman conquest, an archdeacon is mentioned in a chapter of Will. I. as the bishop's vicar; and the exercise of the power of the bishop in the administration of his diocese, being delegated to the archdeacon in such character by long custom, grew into a claim, and those claims being contested were settled by composition. The archdeacon's general capacity as vicar general ceased, and particular divisions were assigned to them, so that, in general, at this day, the power or jurisdiction of the archdeacon is founded on custom and long usage in his own church and diocese.[k] And in general he may be said to

[h] 1 Blacks. 383; Gibs. 969.
[i] Gibs. 969; Degge, P. C. 231, 235; Rogers's E. L. 59.
[k] Gibs. 970; Co. Litt. 94.

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exercise a kind of episcopal authority, which, though originally derived from the bishop, is now independent of and distinct from his;[l] and until a very late period, he had his court for the punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance.

Archdeacons general.

Blackstone speaks of a kind of archdeacons with an authority immediately subordinate to the bishop throughout the whole of his diocese, and these, it seems, were such as by the canon law were called archdeacons general; but, as it is observed in a note by Mr. Justice Coleridge, no instance of this kind now remains in our Church; and it seems doubtful whether this and the present kind of archdeacons were ever existing together, or whether the present archdeacons have grown out of the former, which latter opinion appears the most probable.[m]

Number of archdeaconries, and power of increasing them.

There were in England formerly sixty archdeaconries:[n] but among the recommendations of the ecclesiastical commissioners, recited in the stat. 6 & 7 Will. IV. c. 77, is the creation of new archdeaconries of Bristol, Maidstone, Monmouth, Westmoreland, Manchester, Lancaster and Craven, and that archidiaconal power be given to the Dean of Rochester, within that part of Kent which will remain in the diocese of Rochester; and some of those recommendations have been carried into effect in the manner which is directed by that act. The power of creating new archdeaconries has been since made more extensive; so that now, in any case in which it shall appear to the commissioners, upon the representation of the bishop, to be proper to divide any archdeaconry, on account of its magnitude or other peculiar circumstances connected with it, such archdeaconry may, by the confirmed recommendation of the commissioners, be divided into two or more portions, each of which may be constituted a separate archdeaconry, and a district may be assigned to it, provided that no such division be made without the consent of the bishop under his hand and seal.[o]

Number of archdeaconries.

The division of dioceses into archdeaconries, and the assignment of particular divisions to particular archdeacons, are supposed to have begun a little after the Norman conquest; when the bishops, as having baronies, and being tied by the constitutions of Clarendon to a strict attendance upon the kings in their great councils, were obliged to make larger delegations of power for the administration of

[l] 1 Blacks. 383.
[n] Co. Litt. 94.
[m] Note Coleridge's Ed. of Blacks. vol. i. 383
[o] 3 & 4 Vict. c. 113, s. 32.

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their dioceses, than till that time they had been accustomed to make.[q]

Rank of archdeacon.

In rank and dignity an archdeacon is inferior to a dean, in the same way as a deacon is inferior to a priest; for the dean is styled Archipresbyter, while the archdeacon is styled Archidiaconus.

No person is qualified to be appointed an archdeacon until he has been six years complete in priest's orders.[r]

How to qualify for office.

Archdeacons are by statute to read the Common Prayer, and declare and subscribe their assent thereto before the ordinary; but they are not obliged to subscribe and read the Thirty-nine Articles, because an archdeaconry is not such a benefice with cure of souls as seems to be intended by the statute 13 Eliz. before mentioned; but they are to take the oaths in the same manner as other persons qualifying for offices.[s]

Duties of the archdeacon.

By the canon law the archdeacon is styled the bishop's eye, and his principal duties are stated to be to visit the clergy in his archdeaconry, in such manner as the bishop visits those of his diocese; and to this extent he is the bishop's vicegerent. He has also the charge of parochial churches within his diocese.[t]

But since his power, as we have before observed, is frequently founded on custom and usage, it was formerly not always uniform, but varied in different dioceses: thus in the diocese of Carlisle the archdeacon had no jurisdiction, but he retained that more ancient right of his office, of examining and presenting persons to be ordained, and of inducting persons instituted.[u] But now all archdeacons throughout England and Wales are to have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding.[x]

Uniform jurisdiction.

Visitations by.

In speaking of visitation by bishops, we have already had occasion to observe, that the work of parochial visitation, and also the holding of general synods or visitations, came by degrees to be established as branches of the archidiaconal office, which by this means attained to the dignity of ordinary instead of delegated jurisdiction.[y]

By a constitution of Othobon, it is ordained that archdeacons visit the churches profitably and faithfully, by inquiring of the sacred vessels and vestments, and how the service is performed, and generally of temporals and spirituals, and what they find to want correction that they correct diligently.[z] And it was further ordained by this

[q] Gibs. 970; 1 Warn. 275.
[r] 3 & 4 Vict. c. 113, s. 27.
[s] 13 & 14 Car. 2, c. 4; Wats. c. 15.
[t] Godolph. 61.
[u] 1 Burn's E. L. 96.
[x] 6 & 7 Will. 4, c. 77, s. 19.
[y] Ante.
[z] 4 Burn's E. L. 17.

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as well as by other constitutions, that they should not extort money by giving sentence unjustly; directions not very creditable to the Church at the time when they were thought necessary.

Duties of, in visitations.

By a constitution of Archbishop Reynolds, it was enjoined that archdeacons and their officials in the visitation of churches, have a diligent regard of the fabric of the church, and especially of the chancel, to see if they want repair; and if they find any defects of that kind, limit a certain time under a penalty, within which they shall be repaired.[a] But it must not be inferred from this constitution that the archdeacon's official may visit in his own right, for he can only do so in right of the archdeacon when the latter is hindered;[b] and we may add, that neither must it be inferred from this constitution that the archdeacon has any positive power of compelling the repairs of the fabric of the church; as to which we must refer to what is said upon the subject of church rates; and indeed it may be said that the 86th canon seems to imply that no such power ever existed in archdeacons directly, for it is there directed that all archdeacons (*inter alios*) which have authority to hold ecclesiastical visitations, by composition, law or prescription, shall survey the churches of his or their jurisdiction once in every three years, in his own person, or cause the same to be done; and shall from time to time, within the said three years, certify defaulters to the High Commissioners. In what manner the High Commissioners could or would have proceeded in such a case does not appear; but since that time the High Commission Court has been abolished.

By a constitution of Archbishop Langton, archdeacons, in their visitation, are to see that the offices of the Church are duly administered, and shall take an account in writing of all the ornaments and utensils of churches, and of the vestments and books; and shall require them to be presented before them every year, that they may see what has been added and what lost.[c]

Times of.

It is said that the archdeacon, although there be not a cause, may visit once a year; and if there be cause, he may visit oftener: and that where it is said in the canon law he ought to visit from three years to three years, this is to be understood so that he shall visit from three years to three years of necessity, but that he may visit every year if he will.[d]

In speaking of the bishop's visitation, the exhibits of letters of orders, &c. to be made to him have been men-

[a] Lyndw. 53. [b] Ibid. [c] Lynd. 50. [d] Ibid. 49.

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tioned; and such exhibits of common right are to be made to him only; and therefore, if any archdeacons are entitled to require exhibits in their visitations, it must be upon the foot of custom, the beginning whereof hath probably been an encroachment, since it is not likely that any bishop should give to the archdeacon and his official a power of allowing or disallowing such instruments as have been granted by himself or his predecessors.

Presentments.

At these archidiaconal visitations, the churchwardens are to make presentments, and their duty in that particular will be more fully spoken of hereafter. Anciently we find nothing of churchwardens presenting; but the style is, "the parishioners say," "the laymen say," and the like, until a little before the Reformation, when the churchwardens began to present, either by themselves, or else with two or three more parishioners of credit joined with them. And this last is evidently the original of that office which our canons call the office of sidemen or assistants.[e]

In the beginning of the reign of King James I., a commissary had cited many persons of several parishes to appear before him at his visitation, and because they appeared not, they were excommunicated. But a prohibition was granted, because the ordinary hath not power to cite any into that court except the churchwardens and sidemen. (To these he may give his articles, and inquire by them.[f])

Canons relating to presentments.

The following canons relate to these presentments, and it has been thought best to insert them here in full.

Because it often cometh to pass, that churchwardens, sidemen, questmen, and such other persons of the laity as are to take care for the suppressing of sin and wickedness, as much as in them lieth, by admonition, reprehension and denunciation to their ordinaries, do forbear to discharge their duties therein, either through fear of their superiors, or through negligence, more than were fit, the licentiousness of these times considered, we do ordain, that hereafter every parson and vicar, or in the lawful absence of any parson and vicar, then their curates and substitutes, may join in every presentment with the said churchwardens, sidemen and the rest above mentioned, at the times of visitation, if they the said churchwardens and the rest will present such enormities as are apparent in the parish; or if they will not, then every such parson and vicar, or in their absence as aforesaid, their curates, may themselves present to their ordinaries at such times, and when else they think it meet, all such crimes as they

[e] Gibs. 960. [f] Noy, 123.

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have in charge or otherwise, as by them (being the persons that should have the chief care for the suppressing of sin and impiety in their parishes) shall be thought to require due reformation. Provided always, that if any man confess his secret and hidden sins to the minister, for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, we do not any way bind the said minister by this our constitution, but do straitly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called in question for concealing the same) under pain of irregularity.[g]

It shall be lawful for any godly disposed person, or for any ecclesiastical judge, upon knowledge or notice given unto him or them, of any enormous crime within his jurisdiction, to move the minister, churchwardens or sidemen, as they tender the glory of God and reformation of sin, to present the same, if they shall find sufficient cause to induce them thereunto, that it may be in due time punished and reformed.[h]

For the avoiding of such inconveniences as heretofore have happened, by the hasty making of bills of presentments upon the days of visitation and synods, it is ordered, that always, hereafter, every chancellor, archdeacon, commissary, and every other person having ecclesiastical jurisdiction, at the ordinary time when the churchwardens are sworn, and the archbishop and bishops, when he or they do summon their visitation, shall deliver or cause to be delivered to the churchwardens, questmen, and sidemen of every parish, or to some of them, such books of articles as they or any of them shall require (for the year following) the said churchwardens, questmen, and sidemen to ground their presentments upon, at such times as they are to exhibit them. In which book shall be contained the form of the oath which must be taken immediately before every such presentment; to the intent that, having beforehand time sufficient, not only to peruse and consider what their said oath shall be, but the articles also whereupon they are to ground their presentments, they may frame them at home both advisedly and truly, to the discharge of their own consciences (after they are sworn), as becometh honest and godly men.[i]

Whereas, for the reformation of criminous persons and disorders in every parish, the churchwardens, questmen,

[g] Can. 113. [h] Can. 116. [i] Canon 119.

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sidemen, and such other church officers are sworn, and the minister charged, to present as well the crimes and disorders committed by the said criminous persons, as also the common fame which is spread abroad of them, whereby they are often maligned, and sometimes troubled, by the said delinquents or their friends; we do admonish and exhort all judges, both ecclesiastical and temporal, as they regard and reverence the fearful judgment-seat of the highest Judge, that they admit not in any of their courts any complaint, plea, suit or suits, against any such churchwardens, questmen, sidemen, or other church officers, for making any such presentments, nor against any minister for any presentments that he shall make: all the said presentments tending to the restraint of shameless impiety, and considering that the rules both of charity and government do presume that they did nothing therein of malice, but for the discharge of their consciences.[k]

Presentments on common fame.

No churchwardens, questmen, or sidemen of any parish, shall be enforced to exhibit their presentments to any having ecclesiastical jurisdiction, above once in every year where it hath been no oftener used, nor above twice in every diocese whatsoever, except it be at the bishop's visitation: provided always, that, as good occasion shall require, it shall be lawful for every minister, churchwardens, and sidemen, to present offenders as oft as they shall think meet; and for these voluntary presentments no fee shall be taken.[l]

No churchwardens, questmen, or sidemen, shall be called or cited, but only at the said time or times before limited, to appear before any ecclesiastical judge whosoever, for refusing at other times to present any faults committed in their parishes, and punishable by ecclesiastical laws. Neither shall they or any of them, after their presentments exhibited at any of those times, be any further troubled for the same, except upon manifest and evident proof it may appear that they did then willingly and wittingly omit to present some such public crime or crimes as they knew to be committed, or could not be ignorant that there was then a public fame of them, or unless there be very just cause to call them for the explanation of their former presentments: in which case of wilful omission, their ordinaries shall proceed against them in such sort, as in causes of wilful perjury in a court ecclesiastical it is already provided.[m]

The office of all churchwardens and sidemen shall be reputed to continue until the new churchwardens that shall

[k] Canon 115. [l] Canon 116. [m] Canon 117.

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succeed them be sworn, which shall be the first week after Easter, or some week following, according to the direction of the ordinary; which time so appointed shall always be one of the two times in every year, when the minister, and churchwardens, and sidemen of every parish, shall exhibit to their several ordinaries the presentments of such enormities as have happened in their parishes since their last presentments. And this duty they shall perform before the newly chosen churchwardens and sidemen be sworn, and shall not be suffered to pass over the said presentments to those that are newly come into that office, and are by intendment ignorant of such crimes; under pain of those censures which are appointed for the reformation of such dalliers and dispensers with their own consciences and oaths.[n]

Fees for presentments.

For the presentments of every parish church or chapel, the registrar of any court where they are to be exhibited shall not receive in one year above 4*d.*, under pain, for every offence therein, of suspension from the execution of his office for the space of a month, *toties quoties*.[o]

Perjury of churchwardens in not presenting.

No minister shall in any wise admit to the receiving of the holy communion any churchwardens or sidemen, who, having taken their oaths to present to their ordinaries all such public offences as they are particularly charged to inquire of, in their several parishes, shall (notwithstanding the said oaths, and that their faithful discharge of them is the chief means whereby public sins and offences may be reformed and punished) wittingly and willingly, desperately and irreligiously, incur the horrible crime of perjury; either in neglecting or in refusing to present such of the said enormities and public offences as they know themselves to be committed in their said parishes, or are notoriously offensive to the congregation there; although they be urged by some of their neighbours, or by their minister, or by the ordinary himself, to discharge their consciences by presenting of them, and not to incur so desperately the said horrible sin of perjury.

Arrangements to prevent two or more presentments for the same offence.

In places where the bishop and archdeacon do, by prescription or composition, visit at several times in one and the same year; lest for one and the selfsame fault any of his majesty's subjects should be challenged and molested in divers ecclesiastical courts, we do order and appoint, that every archdeacon or his official, within one month after the visitation ended that year, and the presentments received, shall certify under his hand and seal, to the bishop or his chancellor, the names and crimes of all such as are detected and presented in his said visitation, to the end the

[n] Canon 118. [o] Canon 116.

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chancellor shall henceforth forbear to convent any person for any crime or cause so detected or presented to the archdeacon. And the chancellor, within the like time after the bishop's visitation ended, and presentments received, shall, under his hand and seal, signify to the archdeacon or his official the names and crimes of all such persons, which shall be detected or presented unto him in that visitation, to the same intent as aforesaid. And if these officers shall not certify each other as is here prescribed, or after such certificate shall intermeddle with the crimes or persons detected and presented in each other's visitation; then every of them so offending shall be suspended from all exercise of his jurisdiction by the bishop of the diocese, until he shall repay the costs and expenses which the parties grieved have been at by that vexation.[p]

As to legal proof: in case the party presented denies the fact to be true, the making good the truth of the presentment, that is, the furnishing the court with all proper evidences of it, undoubtedly rests upon the person presenting. And as the spiritual court in such case is entitled by law to call upon churchwardens to support their presentments; so are churchwardens obliged, not only by law (Dr. Gibson says), but also in conscience, to see the presentment effectually supported; because, to deny the court those evidences which induced them to present upon oath, is to desert their presentment, and is little better, in point of conscience, than not to present at all; inasmuch as, through their default, the presentment is rendered ineffectual, as to all purposes of removing the scandal, or reforming the offender. And from hence he takes occasion to wish that the parishioners would think themselves bound (as on many accounts they certainly are bound) to support their churchwardens, in seeing that their presentments are rendered effectual. In any point which concerns the repairs or ornaments of churches, or the providing conveniences of any kind for the service of God, when such defects as these are presented, the spiritual judge immediately, and of course, enjoins the churchwarden presenting, to see the defect made good, and supports him in repaying himself by a legal and reasonable rate upon the parish.[q] But what he intends is, the supporting the churchwardens in the prosecution of such immoral and unchristian livers, as they find themselves obliged by their oath to present, as fornicators, adulterers, common swearers, drunkards, and such like; whose example is of pernicious consequence, and likely to bring many evils upon the parish.[r]

[p] Canon 121.
[q] *Sed quære*, how is such a rate to be enforced?
[r] Gibs. 966.

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Such are the provisions and directions contained in the canons relating to the duties of archdeacons in the subject of visitations and presentments, which, inasmuch as they are contained in all the books on this subject, are retained here; but it is evident that very many of those provisions are inapplicable to the state of the Church at the present day. It does not appear too much to say, that the language of these canons in speaking of churchwardens not presenting, seems unnecessarily harsh and severe. There are moreover many cases in which it now appears settled, that churchwardens may proceed against parties by indictment, or anticipate threatened mischief by obtaining injunction, which appear to render several of the directions of these canons less essential.[s]

May not refuse to swear in churchwardens.

It has been decided, that an archdeacon cannot refuse to administer the oath of office to churchwardens. In a case in Lord Raymond's Reports, a mandamus was directed to the archdeacon of St. Asaph, to swear and admit I. S., being duly elected by the parish according to the custom, to be churchwarden. To which it was returned, that I. S. was *minus habilis*, being a poor dairyman, &c. And the question was, whether the archdeacon can refuse the churchwarden, elected by the parish by the custom, for any cause whatsoever. And Mr. Northey, that he could, argued that the churchwarden is *quasi* a spiritual officer, because he has the care of the church, and all things belonging to it; and the archdeacon is more than a minister, for the party is examined before him in the spiritual court. But it was resolved, that the archdeacon has no power in such case to refuse to swear and admit the churchwarden. For the churchwarden is an officer of the parish, and his misbehaviour will prejudice them, and not the archdeacon; for he has not only the custody, but also the property of the goods belonging to the church, and may maintain actions for them; and for that reason it is an office merely temporal, and the archdeacon is only a ministerial officer. And therefore a peremptory mandamus was granted.[t]

Visitation sermon.

It is customary for the archdeacon at his visitation to call upon one of his clergy to preach what is called a visitation sermon, and, although it appears that formerly it was the duty of the visitor himself to preach this sermon, it seems to be doubtful whether the clergyman so called upon by the archdeacon may refuse.

In the year 1626 Mr. Huntley, rector of Stourmouth, was required by Dr. Kinsley, archdeacon of Canterbury,

[s] See post, Ch. VIII. s. 2. [t] 1 Ld. Raym. 138.

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to preach a visitation sermon, which he refused. And being cited before the high commissioner, it was urged that he was bound to the performance of that office in pursuance of the archdeacon's mandate, by virtue of his oath of canonical obedience. He answered, that he was not a licensed preacher, according to the canons of 1603; and especially, that he was not bound thereunto by his said oath, which implieth only an obedience according to the canon law, as it is in force in this realm; and that there is no canon, foreign or domestic, which requireth him to do this; but on the contrary, that the ancient canon law enjoineth the visitor himself to preach at his own visitation. But the court admonished him to comply, and on his refusal, fined him 500*l.*, and imprisoned him till he should pay the same, and also make submission; and afterwards degraded and deprived him.[u] Although, as Dr. Burn remarks, this may be one instance among others charged against the High Commission Court of carrying matters with a high hand; this may relate rather to the excess of punishment than to the power of punishing; and it does not appear from the books that a case has ever occurred by which the authority of this decision has been reversed.

Archdeacon's Court.

The judge of the Archdeacon's Court, where he does not preside, is called the official, and an appeal lies from that court to the Bishop's Court, or if he be archdeacon of an archbishopric, the appeal from his court is to the Court of Arches.

If the jurisdiction is not peculiar, then the bishop and archdeacon have concurrent jurisdiction, and the party may commence his suit either in the Archdeacon's Court or in the Bishop's, and he may choose which he pleases; but if the archdeacon has a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there and hold court; and in such case if the party who lives within the peculiar be sued in the Bishop's Court, a prohibition should be granted.[x]

How archdeacon affected by the Pluralities Act.

An archdeacon is so far exempt from the provisions and restrictions of the Benefice Pluralities Act,[y] that he is not thereby prevented from holding with his archdeaconry two benefices, subject to the limitations of that act, as to distance, value and population, one being within the diocese of his archdeaconry; or, if a peculiar, then being locally situate within such diocese.

Until recently the endowments of archdeaconries throughout England were generally small. But now it

[u] *John Huntley's case*, 4 Burn's E. L. 19.
[x] *Robinson* v. *Godsalve*, 1 Raym. R. 123.
[y] 1 & 2 Vict. c. 106.

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has been enacted that, by the recommendations of the ecclesiastical commissioners duly confirmed and subject to the consent of the bishop, any archdeaconry may be endowed by the annexation either of an entire canonry, or of a canonry charged with the payment of such portion of its income as shall be determined on, towards providing for another archdeacon in the same diocese, or with such last mentioned portion of the income of a canonry, or by augmentation out of the common fund in the hands of the commissioners; provided that the augmentation shall not be such as to raise the average annual income of any archdeaconry to an amount exceeding 200*l.*, and that no canonry shall be so charged with the payment of a portion of the income thereof to any archdeacon, unless the average annual income of such canonry, after the payment of such portion as aforesaid, shall amount to or exceed 500*l.* But no archdeacon shall be entitled to hold any endowment or augmentation, or other emolument as such archdeacon under these provisions, unless he shall be resident for the space of eight months in every year within the diocese in which his archdeaconry is situate, or as to any present archdeacon, within the diocese in which his archdeaconry was situate before the recent alteration of dioceses.[z]

Power to increase the endowment of archdeacons, and mode of effecting.

By annexing canonries.

Or the following more complicated plan may be adopted for the endowment of archdeaconries. Instead of appointing one archdeacon to either of the new canonries respectively founded in the cathedral churches of St. Paul's and Lincoln, or of annexing a canonry in any cathedral or collegiate church to an archdeaconry as aforesaid charged with any payment to another achdeacon in the same diocese, the rights, duties and emoluments of any canonry, the average annual income of which may exceed 800*l.*, may be annexed to two archdeaconries jointly within the same diocese, not otherwise competently endowed; each archdeacon taking his turn of residence for such time, and taking such share of the emoluments as shall be directed by the scheme and order authorizing such annexation; and each archdeacon shall during his turn of residence have all the rights and privileges of a canon, except as to the division of the emoluments.[a]

Two archdeaconries annexed to a canonry.

As another mode of providing for the endowment of archdeaconries, the patron of any benefice within the limits of any archdeaconry may, with the consent of the bishop of the diocese within which the archdeaconry is situate, endow such archdeaconry by the annexation thereto of

By annexing benefices.

[z] 3 & 4 Vict. c. 113, s. 34. [a] Ibid. sect. 35.

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such benefice; such annexation to take effect immediately, if the benefice be vacant at the time of the endowment, or otherwise upon the then next vacancy thereof; and every benefice so annexed, and every future holder thereof, is to be subject to all the provisions and restrictions of the Benefice Pluralities Act. But it is provided, that no such annexation shall take effect as to any archdeacon in possession at the time of the passing of the act,[b] without his consent; and in default of such consent at the time when any benefice would otherwise so as aforesaid become annexed, or until such consent be given, during the incumbency of such archdeacon, the income and emoluments of such benefice shall, after due provision thereout being made for the cure of souls in the parish or district of such benefice, be applied by the commissioners, either in improving the existing house and buildings, or in providing a new house of residence for such benefice, or in improving or augmenting the glebe belonging thereto, or if no such improvement or augmentation be deemed necessary, then for the benefit of any poor benefice or benefices within the same archdeaconry.[c]

Annexed canonry may be changed.

Any canonry, or portion of the income of a canonry or benefice annexed to any archdeaconry, may at any time, upon the representation of the bishop of the diocese, and by the confirmed recommendation of the commissioners, be disannexed from such archdeaconry upon the vacancy thereof, and annexed to any other archdeaconry in the same diocese.[d]

Thus far, as to the general provisions for the endowment of archdeaconries. The endowment of certain particular archdeaconries is provided for as follows.

Endowments of particular archdeaconries.

The Bishop of London and of Lincoln respectively may from time to time appoint one of the archdeacons of their respective dioceses to the new canonries in the respective churches of St. Paul's and Lincoln, and every archdeacon so appointed shall thereupon become and be a canon of such cathedral church, and a member of the chapter, to all intents and purposes, and entitled to all the same rights and privileges as the other canons.[e] The archdeaconry of Nottingham is endowed by having annexed to it the newly constituted rectory of Southwell, but the archdeacon is subject to the provisions and restrictions of the Benefice Pluralities Act.[f] The archdeaconry of Cardigan is endowed with four twenty-fourth parts of the divisible cor-

[b] June, 1841. [c] 4 & 5 Vict. c. 39, s. 9. [d] Ibid. sect. 11.
[e] 3 & 4 Vict. c. 113, s. 33. [f] 4 & 5 Vict. c. 39, s. 12.

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porate revenues of the cathedral church of St. David.[g] The archdeacons of Brecon and Carmarthen are respectively endowed out of the revenues of the collegiate church of Brecon.[h] The archdeaconry of Llandaff is annexed to the deanery, and is endowed with three-sevenths of the whole divisible corporate revenues of the cathedral church.[i]

Former estates of newly endowed archdeaconries vested in commissioners.

Upon the endowment of any archdeaconry by either of the above modes, and with the consent of the bishop of the diocese and of any archdeacon in possession at the time of passing the act,[k] all lands, tithes, and other hereditaments, except any right of patronage belonging to such archdeaconry at the time of such endowment, may, by the confirmed recommendation of the commissioners, be vested in them and their successors; and any benefice annexed to such archdeaconry may, by the same authority, be disannexed therefrom, and the patronage of such benefice shall thenceforth revert to the patron to whom it belonged before such annexation, subject to any transfer of patronage provided for by the same act.[l]

Section 7.

Rural Deans.

Their office formerly.

There can be no question but that in former times the rural deans were important officers in the church establishment. They appear to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation; and armed in minuter matters with an inferior degree of judicial and coercive authority.[m] Blackstone says of them, that they are very ancient officers of the Church, but almost grown out of use, though their deaneries still subsist as an ecclesiastical division of the diocese or archdeaconry.[n]

Recently their office has in many instances been revived; and an interesting work has been lately published, in which the history of the origin, progress, and gradual decay of their office has been traced with much care and research.[o] But legally speaking the office can be scarcely said to exist, or to have any duties necessarily connected with it; for during the long period of its decay, custom

[g] 3 & 4 Vict. c. 113, s. 38. [h] Ibid. sect. 39. [i] Ibid. sect. 40.
[k] August 11, 1840. [l] Ibid. sect. 56. [m] Gibs. Cod. 972, 1550.
[n] 1 Comm. 383. [o] Horæ Decanicæ Rurales.

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seems to have transferred all the necessary duties of such an office to the archdeacon; as in the visitation of churches, houses of residence, &c. At the present day, therefore, the duties of the rural dean would be only such as he might be deputed to perform by the bishop or archdeacon, for the performance of many of which it seems that the office may very usefully be revived.

In several of the statutes which direct the issuing of commissions by the bishop, the rural dean is mentioned, as a party who is to be one of the commissioners: his duties in such matters, as a commissioner, will be found mentioned where such commissions are treated of.

Section 8.

Of Rectors, Vicars, and Perpetual Curates.

Distinction between, considered.

It will be obvious that the subjects which might be treated of under this head are of great variety and extent; the greater number of these, however, will be found treated of under the subject of benefices and their incidents. But the connexion between the rector and his rectory, the incumbent and his benefice, is so close, that it is almost impossible to separate the consideration of the two subjects. The manner, therefore, in which rectors and vicars may become such, the incidents to them in that character, and the manner in which their office may determine, although apparently subjects which might be considered in the present chapter, are reserved for the chapters on benefices; while at present we shall only consider the distinctive personal characters of the three kinds of incumbents above mentioned.

Rectors and parsons.

The appellation of rector is synonymous with that of parson, which latter term, although frequently used indiscriminately, as applicable also to vicars and even curates, is, according to Blackstone, the most legal, beneficial, and honourable title that a parish priest can enjoy. Parson, in the legal signification, is taken for the rector of a church parochial: he is said to be seised *in jure ecclesiæ*. Such a one, and he only, is said *vicem seu personam ecclesiæ gerere*. He is called parson (*persona*) because by his person the church, which is an invisible body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession.[p] And, as Lord Coke says, the law

Meaning of "parson."

[p] 1 Black. Com. 384.

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had an excellent end therein, viz., that in his person the church might sue for and defend her right. A parson, therefore, is a corporation sole, and has during his life the freehold in himself of the parsonage house, the glebe, the tithe and other dues.[q]

Appropriations.

But these are sometimes appropriated; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed, as we shall observe in treating of tithes, in a four-fold division: one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only; and hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest, and that the remainder might well be applied to the use of their own fraternities (the endowment of which was construed to be a work of the most exalted piety), subject to the burden of repairing the church, and providing for its constant supply. And, therefore, they begged and bought for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But in order to complete such appropriation effectually, the king's license and consent of the bishop must first be obtained; because both the king and the bishop may, some time or other, have an interest, by lapse, in the presentation to the benefice, which can never happen if it be appropriated to the use of a corporation, which never dies, and also because the law reposes a confidence in them, that they will not consent to anything that shall be to the prejudice of the church. The consent of the patron also is necessarily implied, because (as was before observed) the appropriation can be originally made to none but to such spiritual corporation as is also the patron of the church; the whole being indeed nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any

[q] Co. Litt. 300.

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clerk, they themselves undertaking to provide for the service of the church.[r]

Impropriations.

The terms appropriation and impropriation[s] are now so commonly used indiscriminately, that it has become almost unnecessary to mention the distinction between them; but appropriation, in contradistinction to impropriation, means the annexing a benefice to the proper and perpetual use of some spiritual corporation, either sole or aggregate, being the patron of a living, which is bound to provide for the service of the church, and thereby becomes perpetual incumbent, the whole appropriation being only an allowance for the spiritual patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church; while impropriation is supposed to be properly used when the profits of the benefice are held in lay hands, as being improperly so.[t] But, in truth, the correctness of the distinction, even originally, seems doubtful; they are used as synonymous in statutes in the times of Elizabeth, of Mary, and of Charles II.; and even prior to the Reformation, in a petition to parliament in the time of Henry VIII., the term used is "impropried." Both terms were borrowed from the form of the grant "*in proprios usus*," and they are peculiar or principally confined to this country. Blackstone says, that appropriations can be made at this day, upon which Mr. Christian observes, it cannot be supposed that at this day the inhabitants of a parish who had been accustomed to pay their tithes to their officiating minister, could be compelled to transfer them to an ecclesiastical corporation, to which they might be perfect strangers," and, "that there probably have been no new appropriations since the dissolution of monasteries." Upon this same proposition, Mr. Justice Coleridge observes, alluding to the opinion of Mr. Christian, "The truth of this position has been questioned, and the doubt is not likely to be solved by any judicial decision. But I am not aware of any principle which should prevent an impropriation from being now legally made, supposing the spiritual corporation already seised of the advowson of the church, or enabled to take it by grant. The power of the king and the bishop remain undiminished."[u]

Appropriation may be severed.

This appropriation may be severed, and the church become disappropriate, two ways; as first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage; for the incumbent, so instituted and in-

[r] 1 Black. Com. 384.
[s] See *Duke of Portland* v. *Bingham*, 1 Hag. 156.
[t] 1 Black. Com. 384.
[u] See note to Blacks., *ante*.

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ducted, is, to all intents and purposes, complete parson; and the appropriation being once severed, can never be re-united again, unless by a repetition of the same solemnities. And when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a sinecure, because he hath no cure of souls, having a vicar under him, to whom that cure is committed. Also, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation.[e]

Sinecure rectories.

These sinecure rectories here spoken of had their origin in the following manner. The rector, with proper consent, had a power to entitle a vicar in his church to officiate under him, and this was often done; and by this means two persons were instituted to the same church, and both to the cure of souls, and both did actually officiate. So that however the rectors of sinecures, by having been long excused from residence, are in common opinion discharged from the cure of souls (which is the reason of the name), and however the cure is said in the law books to be in them *habitualiter* only, yet, in strictness, and with regard to their original institution, the cure is in them *actualiter*, as much as it is in the vicar, that is to say, where they come in by institution; but if the rectory is a donative, the case is otherwise; for coming in by donation, they have not the cure of souls committed to them. And these are most properly sinecures, according to the genuine signification of the word.[f]

No sinecure where there is but one incumbent.

But no church, where there is but one incumbent, is properly a sinecure. If indeed the church be down, or the parish become destitute of parishioners, without which divine offices cannot be performed, the incumbent is of necessity acquitted from all public duty; but still he is under an obligation of doing this duty, whenever there shall be a competent number of inhabitants, and the church shall be rebuilt. And these benefices are more properly depopulations than sinecures.[g]

Suppression of sinecure rectories.

But sinecure rectors and rectories are now in the course of gradual suppression, and will soon have entirely passed away, for it is declared by the stat. 3 & 4 Vict. c. 113,[h] that all ecclesiastical rectories, without cure of souls, in the sole patronage of her Majesty, or of any ecclesiastical corporation, aggregate or sole, where there shall be a vicar endowed or a perpetual curate, shall, as to all

[e] 1 Black. Com. 385.
[f] Johns. 85; 3 Burn's E. L. 372.
[g] Ibid.
[h] Sect. 48.

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such rectories as may be vacant at the passing of that act,[1] immediately upon its so passing, and as to all others immediately upon the vacancies thereof respectively, be *suppressed;* and that as to any such ecclesiastical rectory without cure of souls, the advowson whereof, or any right of patronage wherein, shall belong to any person or persons, or body corporate, other than as aforesaid, the ecclesiastical commissioners for England shall be authorised and empowered to purchase and accept conveyance of such advowson or right of patronage, as the case may be, at and for such price or sum as may be agreed upon between them and the owner or owners of such advowson or right of patronage, and may pay the purchase-money, and the expenses of and attendant upon such purchase, out of the common fund in their hands; and that after the completion of such purchase of any such rectory, and upon the first avoidance thereof, the same shall be suppressed; and that upon the suppression of any such rectory as aforesaid, all ecclesiastical patronage, belonging to the rector thereof as such rector, shall be absolutely transferred to, and be vested in, the original patron or patrons of such rectory.

Vicar, origin of.

The office of vicar, as distinct from that of rector, would sufficiently appear from what has been already said of the latter. The vicar was originally little more than a stipendiary curate of the present day, being a minister deputed or substituted by the spiritual corporation, who held the revenues of the benefice, to perform the ecclesiastical duties in their stead. Usually, though not always, he was one of their own body; and his stipend was entirely at their discretion, and he was removable at their caprice. The evil results of such a practice are apparent; and an ineffectual attempt to arrest the evil was made by a statute in the reign of Richard II., but this was found to be insufficient; and accordingly it was enacted by statute 4 Henry IV. c. 12, that the vicar should be a secular ecclesiastic, perpetual, not removeable at the caprice of the monastery; that he should be canonically instituted and inducted; that he should be sufficiently endowed at the discretion of the ordinary to do divine service, to inform the people, and to keep hospitality. It is under this latter statute therefore that our vicarages in their present form came into existence, and the endowments of them have usually been by a portion of the glebe or land belonging to the parsonage; and a particular share of the tithes which the appropriators found it most troublesome to collect, and which are there-

Endowment of.

[1] August 11, 1840.

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fore generally called privy or small tithes; the greater or predial tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily endowed; and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.

Distinction between rector and vicar.

The distinction therefore between a rector and a vicar at the present day is this, that the rector has generally the whole right to all the ecclesiastical dues within his parish; the vicar is entitled only to a certain portion of those profits, the best part of which are absorbed by the appropriator, to whom, if appropriations had continued as in their origin, he would in effect be perpetual curate, with a fixed salary.

Patrons of vicarages.

The parson, and not the patron of the parsonage, is of common right, the patron of the vicarage. The parson, by making the endowment, acquires the patronage of the vicarage. For in order to the appropriation of a parsonage, the inheritance of the advowson was to be transferred to the corporation to which the church was to be appropriated; and then the vicarage being derived out of the parsonage, the parson, of common right, must be patron thereof. So that if the parson makes a lease of the parsonage (without making a special reservation to himself of the right of presenting to the vicarage), the patronage of the vicarage passeth as incident to it. But it was held in the 21st James I. that the parishioners may prescribe for the choice of a vicar. And before that, in the 16th James I. in the case of *Shorley* and *Underhill*, it was declared by the court, that though the advowson of the vicarage of common right is appendant to the rectory, yet it may be appendant to a manor, as having been reserved specially upon the appropriation.[k]

Uniting rectory and vicarage.

And if there be a vicar and parson appropriate, the ordinary and parson appropriate may, in time of vacation of the vicarage, re-unite the vicarage to the parsonage.[l]

Perpetual curates.

From what has been already observed of the distinction between rector and vicar, it will be easy to anticipate what remains to be said of a perpetual curate; for a perpetual curate is, in many things, in the same position as was a vicar previous to the stat. of Henry IV. before mentioned. The fact is, that certain cases were exempted from the operation of that statute; for if the benefice was given *ad mensam monachorum*, and so not appropriated in the common form, but granted by way of union *pleno jure*, it was allowed to be served by a curate of their own house,

[k] 1 Burn's E. L. 79. [l] Rogers's E. L. 892.

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consequently not a secular ecclesiastic; and the like exemption from the necessity of appointing a vicar was sometimes also granted by dispensation, or on account of the nearness of the church.[m]

Their origin.

At the dissolution of the monasteries, when appropriations were transferred from spiritual societies through the king to single lay persons, to them also, for the most part, was transferred the appointment of the vicars in the parishes where they were the appropriators, and in places where, by means of exemptions, there was no regularly endowed vicar; and as they were appropriators of the whole ecclesiastical dues, the charge of providing for the cure was laid on them, for neither in fact, nor in presumption of law, nor *habitualiter*, could a lay rector as such have cure of souls; they were consequently obliged to nominate some particular person to the ordinary for his license to serve the cure; and such curates thus licensed became perpetual, in the same manner as vicars had been before, not removable at the caprice of the appropriator, but only by due revocation of the license of the ordinary.[n]

Perpetual curacy is a benefice.

A perpetual curacy was formerly adjudged not to be an ecclesiastical benefice, so that it was tenable with any other benefice; but now perpetual curacies are expressly declared to be benefices within the meaning of that word, in the Benefices Pluralities Act, and a perpetual curate is consequently liable to its restrictions, in the same manner as any other incumbent.[o]

What is a perpetual curacy.

In some cases it might be a matter of considerable difficulty to determine whether a place is a perpetual curacy or a chapelry only; and the more so, since for most practical purposes the question would be quite immaterial, and therefore less likely to have been judicially determined; but as an aid in deciding certain other questions which might arise, it might be important; and the following are the rules laid down by Lord Hardwicke for determining whether it is perpetual curacy or not.

Three tests to determine it.

To determine this, he says, consider it first as to the rights and privileges appearing to belong to the chapel itself; next as to the right of the inhabitants within the district; thirdly, as to the rights and dues belonging to the curate of the chapelry. If all these rights concur to show the nature of a perpetual curacy, that must determine it.

[m] See 1 Black. Com. 387.

[n] Gibs. 819; *Duke of Portland* v. *Bingham*, 1 Hagg. Rep. 162; *Attorney-General* v. *Brereton*, 2 Ves. sen. 427.

[o] See 1 & 2 Vict. c. 106.

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First test: Rights belonging to the church.

As to the first consideration, it appears this is a chapel belonging to a country town. It has belonging to it all sorts of parochial rights, as clerk, warden, &c., all rights of performing divine service, baptism, sepulture, &c., which is very strong evidence of itself that this is not barely a chapel of ease to the parish to which it belongs, but stands on its own foundation, *capella parochialis*, as it is called in Hobart; and this differs it greatly from the chapels in London, which are barely chapels of ease, commencing within time of memory, which have not baptism or sepulture; all which sort of rights belong to the mother church, and the rector or vicar of the parish, who has the cure of souls, has the nomination, as the rector of St. James's or St. Martin's has, but they have no parochial rights, which clearly belong to this chapel. Nor have any of the inhabitants of this chapelry a right to bury in the parish church of Northop,[p] and that right of sepulture is the most strong circumstance, as appears from 3 Selden's Hist. Tithes, fol. column 1212, to show that it differs not from a parish church.

Right of sepulture.

Second test: Rights of the inhabitants.

The next circumstance to determine this question is the right of the inhabitants, viz. to have service performed there, and baptism, and christening, and having no right to resort to the parish church of Northop for these purposes, nor to any other place, if not here; nor are they or have they been rateable to the parish church of Northop. It was determined in the case of *Castle Birmidge*, Hob. 66, that the having a chapel of ease will not exempt the inhabitants within that district from contributing to repairs of the mother church, unless it was by prescription, which would then be a strong foundation that it must be considered as a curacy or chapelry.

Third test: Rights of the curate.

Next, as to the rights and dues of the curate. All these concur to show it to be a perpetual curacy, and not at all at the will and pleasure of the vicar; for the curate has always enjoyed the small tithes and surplice fees, nor is there any evidence to show that the vicar has received the small tithes.[q]

Nomination to, may be by parol.

A nomination to a perpetual curacy may be by parol. "Most regularly," Lord Hardwicke says, "it ought to be in writing;" but, he adds, "I do not know that it has been determined that it is necessary. A presentation to a church need not be in writing, but may be by parol; if so, I do not see why a nomination to a perpetual curacy may not be by parol."[r]

[p] The parish to which it was contended that this was a chapel only.
[q] See *Attorney-General* v. *Brereton*, 2 Ves. sen. 427. [r] Ibid.

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Is an interest for life.

A perpetual curate has an interest for life in his curacy, in the same manner and as fully as a rector or vicar, that is to say, he can only be deprived by the ordinary, and that in proper course of law; and, as Lord Hardwicke observes, it would be a contradiction in terms to say that a perpetual curate is removable at will and pleasure.[s]

The ministers of the new churches to which separate parishes or ecclesiastical districts have been assigned under the provisions of the Church Building Acts, are perpetual curates, so that they are severally bodies politic and corporate, with perpetual succession; and consequently may accept grants made to them and their successors; and they are to be licensed and to be removable in the same manner as other perpetual curates. This is also the case with those ministers who are appointed to new districts or parishes under the Church Endowment Act. And as license operates to all such ministers in the same manner as institution would in the case of a presentative benefice, it would render voidable any other livings which such ministers might hold, in the same manner as institution.[t]

Section 9.

Of Ministers of Chapels of Ease, Proprietary Chapels, &c. and of Lecturers.

Parties here treated of.

The ecclesiastical persons above mentioned will be conveniently considered together in the present chapter, since the law, so far as it is here treated of, that is, so far as it affects these persons in their relation to the bishop and to the incumbent of the parish, applies equally, or very nearly so, to all who being neither rectors, vicars, perpetual nor stipendiary curates, nor such ministers of new churches as are to be legally deemed perpetual curates, officiate nevertheless in some church or chapel by virtue of a license from the bishop or archbishop; which license is to these persons what institution is to the rector or vicar.

Lecturer, office of.

The office of lecturer is always engrafted upon some already existing ecclesiastical establishment, where the spiritual wants of the parish are already in part supplied by there being antecedently some person appointed to perform the rites and service of the church;[u] and, in its

[s] See *Attorney-General* v. *Brereton*, 2 Ves. sen. 427.

[t] See 1 & 2 Will. 4, c. 38, s. 12; 2 & 3 Vict. c. 49, s. 2; 6 & 7 Vict. c. 37, s. 12.

[u] 15 East, 142.

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strictest sense, a lecturer would be a spiritual person licensed to read the service in a parish church at some other times and on some other occasions than those when the service is performed by the incumbent or his curate; but as the minister of the parish has the same ecclesiastical rights out of his church as in it, and throughout his whole parish, and is entitled to perform the service in every consecrated building in his parish,[v] a lecturer would be in the same position as regards him, whether he was to officiate in the parish church or in some chapel situate within the parish. Consequently, that term has been often used as denoting all spiritual persons, licensed as such to officiate at some time independently of the minister, whether in the parish church or in some chapel within the parish. But these cases must not be confounded with those of ministers of churches or chapels which, although in some sense within the parish, have a separate ecclesiastical district assigned to them.[x]

Extended meaning of the word.

As to the foundation of such offices, it can only be done with the assent of patron, incumbent and ordinary, for as it was said in argument in the case of *The King* v. *Bishop of Exeter*,[y] it would be productive of great public inconvenience if every person who chose to dedicate a small freehold in a parish to the use of a lecturer, could therefore appoint whom he pleased to preach in the parish church without the assent of the incumbent. By the same rule, any number of persons might do the same to the entire overthrow of all order and discipline in the Church. And it was by that case completely established, that it was not competent to any person to engraft a lectureship by compulsion on the Church; for that otherwise it might be done for the most capricious purposes, and in abuse of the regular institutions of the Church, and might overthrow the whole establishment.

Foundation of. What consent necessary.

In consequence of the objection by the vicar, in whose parish a lectureship was founded, the Bishop of Exeter refused to license the lecturer, who thereupon applied for a mandamus to compel him. It was objected that the period when this lectureship was founded, *anno domini* 1658, proved not only that it was not immemorial, but that it could not have a legal origin for want of one of the proper parties to assent to the endowment; for that this, together with other sees in the kingdom, was at that time vacant. Upon which Lord Ellenborough says, "This cannot exist by immemorial custom, which the law presumes to have had a legal commencement, because it is

Immemorial custom.

[v] 2 Hagg. R. 46. [x] See Book III. Chap. I. [y] 2 East, 462.

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traced to its commencement in 1658, and it could not then have had a legal commencement; because, even if the bishop, the rector and the vicar could by their joint consent engraft it on the Church, there were no such persons then at all existing having competent authority to accept the endowment on the part of the Church.[z] In another case,[a] the circumstance that the lectureship was not endowed, but depended upon voluntary contributions, was considered sufficient proof that it could not have existed by immemorial usage; and so in another case,[b] where there was no endowment, but the lecturer received a certain sum from the parish officers out of the money raised by the *poor rates;* which was like the case of a rank modus, and carried upon the face of it evidence of having had a commencement since the establishment of poor rates, and consequently within the time of legal memory.

Express act of parliament.

Besides immemorial usage, a lectureship may be established in a parish by express act of parliament; and this is the case with the lectureships in several of the metropolitan parishes.

Endowment what proof of custom.

If the lectureship be endowed, that circumstance, according to Lord Mansfield,[c] affords a strong argument to support the custom, and to show that it had a legal commencement; but if the period of the endowment and the commencement of the usage under it could be shown, the argument would be of no force.

Lord Northington appears to have considered that a mere arbitrary agreement between patron, parson and ordinary, to a foundation of a chapel of ease in the parish, could not be supported; but that if such an agreement included a compensation to the parson, it might be good.[d] Upon which opinion it is observed by Abbott, C. J.:[e] "Perhaps that expression requires some qualification; and where nothing is taken from the income of the incumbent, the consent of the parson, patron and ordinary, without a compensation, may be sufficient."

Incumbent may, in all cases, object to any particular appointment.

The effect of an endowment and immemorial custom proved, would be, that the bishop could not refuse to license, or the incumbent refuse his assent to an appointment generally; but as to their right to refuse in the case of any particular person who might be appointed, that, whether the foundation were proved to be legal or not, is undoubted, unless the immemorial usage proved be that

[z] *The King* v. *Bishop of Exeter*, 2 East, 462.
[a] *The King* v. *The Bishop of London*, 1 T. R. 331.
[b] *The King* v. *Field and others*, 4 T. R. 125.
[c] 1 Term R. 333. [d] 2 Ambl. 532. [e] See 4 Barn. & Cres. 568.

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the lecturer should be appointed independently of any assent of the incumbent; for Lord Mansfield says, nothing can be so clear as that no person can use the pulpit of a rector unless he consents; or, in other words, no man can be a lecturer without such consent;[f] and the mere fact of a number of successive nominations, without any objection by the incumbent, cannot, it appears, oust him of his right;[g] so that in ordinary cases, even where the lectureship is endowed, and has a legal origin, the assent of each successive incumbent would be necessary to allow the lecturer to officiate.[h]

Even though the bishop has licensed.

And, notwithstanding the license of the bishop, the incumbent may still refuse to allow the clergyman to officiate. In the case of a chapel of ease within the parish, Abbott, C. J., says,[i] "It appears to me that no person can have a right to compel the vicar of the parish to allow another, although licensed by the bishop, to officiate in a public chapel, erected for the ease of the inhabitants of a portion of the parish, and that no such person can officiate without the consent of the vicar." And the words of Mr. Justice Bayley, in his judgment in the same case, are most decisive and important: "My opinion," he says, "is founded upon this general position, that you have no right, without the concurrence of the patron and incumbent, to interfere either with the temporal rights or spiritual obligations of the vicar. It has been conceded that if you were to interfere with the temporal rights of the vicar, the claim of a right of nomination, as resulting from the endowment, could not be supported; but it was argued that its interference with the spiritual obligations of the vicar did not stand upon the same footing. It appears to me that if the vicar has the cure of souls coextensive with the whole limits of his parish, that casts a very serious and important duty upon him; and he has a right, and is bound, as the *conservator parochiæ*, to take care that no person shall deliver doctrine in that parish except under his sanction and authority. It is said that the bishop will never appoint an unfit person; but if the vicar has the cure of souls in the parish, he has a right to act on his own judgment, and is not bound to trust to the judgment of the ordinary."[k] And the same was assumed to be law in the case of the *King* v. *The Bishop of Exeter*, above mentioned, where it was mentioned as an additional reason for refusing the *mandamus*, that it might, after all,

[f] 1 T. R. 333. [g] 2 Eden, 365. [h] See post, Duties of Ministers.
[i] *Farnworth* v. *Bishop of Chester*, 4 Barn. & Cres. 555.
[k] 4 Barn. & Cres. 570.

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be nugatory; for that it appeared that the vicar's consent was also withheld; by which of course it is assumed that he might disregard the license of the bishop.

How far the incumbent might arbitrarily refuse.

But supposing the bishop to have licensed a lecturer to officiate where there was a proper endowment and foundation, it may be doubtful how far the incumbent could, arbitrarily and without reason assigned, refuse his consent. The case does not seem to have occurred; but that which is afterwards said as to a bishop refusing to license, would probably be applicable to the case of an incumbent refusing to assent. The Court of King's Bench would see that the incumbent had some grounds for refusal, although not compelling him to state them fully or precisely; but such a case would be less likely to occur, since the bishop would probably consider it a sufficient cause for refusing to license, that the lecturer had not obtained the assent of the incumbent; and this, in fact, was the sole alleged reason for the refusal of the bishop in the case of *The King* v. *The Bishop of Exeter*.

License by the bishop.

By the 19th section of the last Act of Uniformity,[l] it is enacted, that no person shall be received as a lecturer, or permitted, suffered or allowed to preach as a lecturer, or to preach or read any sermon or lecture in any church, chapel or other place of public worship within this realm of England, or the dominion of Wales, and town of Berwick-upon-Tweed, unless he be first approved and thereunto licensed by the archbishop of the province, or bishop of the diocese." And as Lord Ellenborough says,[m] "Where a new institution of this kind was to be superinduced upon the old and pre-existing foundations of the church, it became perhaps the wisdom, it certainly was congenial with the jealousy of the times in which this statute was passed, which were recently after the civil and political troubles and the contentions on matters of religion by which the country had been agitated, to provide, 'that where a lecturer was to be admitted into any church or chapel, the bishop should be satisfied that he was a person to whom the lecturing and teaching of the congregation could be safely committed.'"

Bishop may refuse to license.

The leading case, as an authority to show the power of the bishop to refuse to license, is that of *The King* v. *The Archbishop of Canterbury and Bishop of London*.[n] In that case the bishop had stated upon affidavits, "that his sole reason for refusing to license the Rev. R. P. to the Friday Lectureship at the Church of St. Bartholomew, Exchange, was a conscientious opinion and conviction,

[l] 13 & 14 Car. 2, c. 4. [m] 15 East, 142. [n] 15 East, 117.

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arising from every circumstance which, after diligent inquiry, he had been able to learn concerning the said R. P.'s conduct and ministry as a clergyman, that he could not, consistently with his duty as Bishop of London, approve of him as a fit person for such lectureship; that through the whole course of this transaction he had acted according to the best of his judgment, merely from a sense of the duty imposed upon him by his office, to approve of no one whom he did not in his conscience think to be a fit person; that the said R. P. had been repeatedly admitted before him with a view to his being approved and licensed to preach the Friday Morning Lecture at St. Bartholomew; and that he has made diligent inquiry respecting the conduct and ministry of the said R. P. as a clergyman; and that being convinced from such inquiry that the said R. P. was not a fit person to be permitted and allowed to preach the said lecture, he had conscientiously, and according to the duty of his office as Bishop of London, and for no other motive or reason whatever, decided and determined, after the said R. P. had been so admitted before him, and after having heard him, that he could not approve or license him thereunto; and that such decision was formed by him, and was still adhered to, upon a full and deliberate consideration of all the circumstances he had been able to learn respecting the said R. P.; and that in forming such decision, and through the whole of this transaction, he had acted according to the best of his judgment, and from a conviction that the duty imposed upon him by his office required that he should not approve of or license any one to a lectureship whom he did not in his conscience believe to be a fit person to fill the office."

What would be sufficient reason for him to allege for his refusal.

This statement by the bishop was deemed by Lord Ellenborough to be sufficient; and he refused to grant any mandamus. "If the bishop," he says, "had not in this case inquired so as to enable himself to give a considerate approbation or refusal on the subject, it might have been a fit case for the interference of the court to further such inquiry. *But such a statement as that made by the bishop is conclusive,* unless the court were prepared to decide that the function of approbation is vested in them, and not in the bishop; and that notwithstanding the conscientious judgment, which upon a full and deliberate consideration of the subject he has come to, and his declared conviction that he would be acting in a manner wholly inconsistent with the duties of his episcopal function, and the trust reposed in him by the legislature, if he did license him, we should nevertheless grant a mandamus to the bishop to

Extent to which the Court of Queen's Bench would interfere.

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say, 'Approve, though you do not approve; take our conscience to guide you, and not your own.' There is no instance of such an application for a mandamus to compel a bishop to approve; we can only compel him to inquire; we cannot divest him of that function which the legislature has for wise purposes vested in him, and transfer it to ourselves: all that the court can ever do is to see that the function is well exercised by him in whom it is so vested; and there never yet has been an instance of a mandamus to compel a bishop to approve and license a lecturer, where the question turned on the approbation or disapprobation of the bishop as to the fitness of the applicant. It has been urged, however (and much stress was laid upon it in the argument), that it was the duty of the bishop to have instituted his inquiry upon the subject, in the manner and by the means usually adopted in courts of law, that is, by the formal production of the charges made against the applicant in a judicial course, and by a public and solemn hearing of the several parties, their proofs and witnesses. But, in the first place, what power has the bishop to compel the attendance of parties and witnesses? what power has he to administer an oath? or what word is there in the act of parliament that prescribes the mode by which he shall attain a conscientious satisfaction on the subject. It only requires him first to approve, that is, before he licenses; and in so doing it virtually requires him to exercise his conscience duly informed upon the subject; to do which he must duly, impartially, and effectually inquire, examine, deliberate, and decide. If the court have reason to think that any thing is defectively done in this respect, it will interpose its authoritative admonition. The mandamus to license, if the party shall be found to be a fit person, is a solemn and peremptory call upon the bishop to adopt the requisite means for duly informing his conscience, in order to the correct and effectual exercise of this most important duty. What scales have we to weigh the conscience of the bishop? And how are we to know whether he properly or improperly disapproves? May he not properly disapprove of the candidate for a lecturer's license, on account of many matters which cannot be conveniently stated to a court of justice? May he not disapprove for matters within his own personal observation and knowledge: for the habits of life and conversation of the person, which might be known to him from residing in the same university or society with him; from his conduct in life, down perhaps to the very time when the bishop is called upon to signify his approbation? Is he to exclude his own knowledge,

Mode in which the bishop may inquire before refusal.

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the most material of any? Does the law say upon what proof he is to act? or that he is to have witnesses upon oath to the facts by which his judgment is to be guided? What authority has he to compel the attendance of witnesses before him? The word of the statute is approve; and *he must exercise that approbation according to his conscience, upon such means of information as he can obtain;* and every thing that can properly minister to his conscientious approbation or disapprobation, and fairly and reasonably induce his conclusion on such a subject, though it might not be evidence that would be formally admitted in a court of law, may, I am of opinion, be fitly taken into consideration."[m]

License from the archbishop.

It will be observed that the statute speaks of a license from the bishop or archbishop; and it was for that reason that the mandamus in the above case was applied for against both those parties. But Lord Ellenborough says, "respecting the archbishop, I have no doubt that, as provincial and metropolitan, he has a function to exercise upon this subject. My reason for saying so is, because the act appears to me to have distinctly said so. I do not say that the application should go in *inverso ordine* to the archbishop in the first instance, and afterwards to the bishop; or that it is to go from the one to the other in the nature of an appeal: but I think it is competent to the party, if he please, to apply to the archbishop, as well as to the bishop, for the license. The answer which has been given is, that the instances that have occurred, to the knowledge of the archbishop's officers, have been only in cases within the archbishop's own peculiar diocese, which he has distinct from his provincial jurisdiction. But that he has exercised the function only in those instances, merely proves that such applications only have been made: it does not prove negatively that which would have appeared if there had been applications actually made to him for his interference from others within his province at large, and rejected: viz. a refusal of his interference, and an acquiescence (if nothing appeared to the contrary) in that refusal; but there is no such instance. Considering, however, that it was in a late stage of the business that the archbishop was introduced at all into this rule; and not being satisfied that it is right to complicate in the same rule the question of a mandamus to the bishop and to the archbishop, in the sort of alternative mode which is held out in the terms of this rule; and as the question is quite a new one as it

[m] This extract from the judgment is long, but it would be impossible to lay down any rule for guidance in such cases in language more clear and perspicuous.

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respects the archbishop; I think, if there be any application for a mandamus to be addressed to the archbishop, that it ought to be a substantive application standing upon its own ground."

Power to appeal to archbishop from refusal by bishop. *Quære.*

No such substantive application appears to have been made, but the words of Lord Ellenborough, that the archbishop had a function to exercise as provincial and metropolitan, would imply that he considered there might be an appeal from the bishop refusing to license, to the archbishop of the province.

The more ancient lectureships seem to have had their foundation in the pious intentions of individuals or of parishes; in modern times, they have frequently been established by act of parliament, in order to afford the inhabitants of populous parishes more frequent opportunities of attending the public service of the church.

Election and nomination of lecturers.

In London and other populous places, where lectureships have been established, it has been very usual for the lecturer to be chosen by election, sometimes by the vestry or chief inhabitants, and sometimes by the inhabitants at large; and it has frequently happened that contests have arisen as to the class of persons in whom the right of election is vested.

And with respect to all such lectureships as depend upon the voluntary contribution of the inhabitants, or which are paid out of the rates, &c., it seems reasonable the election should be with those by whom the stipend is paid, and who might otherwise perhaps refuse to contribute; but any election by them would be nugatory without the assent of the incumbent. Other cases, where there is an endowment, may depend upon immemorial usage or act of parliament, but except in such cases the right to nominate would, as it seems, be in the incumbent.

Nomination to chapels of ease.

As to chapels of ease, it is clearly laid down by Lord Northington as undoubted law, that whenever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister; unless there is a special agreement to the contrary, which gives a compensation to the incumbent of the mother church: a mere arbitrary agreement between patron, parson and ordinary, without such a compensation, is not to be supported. In the case of prescription, every thing is presumed to have been proper. An agreement with, or compensation to, the parson is supposed.[n] But in quoting this dictum of Lord Northington, Abbot, C. J. says, perhaps that expression requires some qualification; and where nothing is taken from the

[n] 2 Ambler, 531.

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income of the incumbent, the consent of the parson, patron and ordinary, without a compensation, may be sufficient. But still the doctrine which appears to have been the foundation of the decision is distinctly this: that it is undoubtedly law, that wherever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, to which parson, patron and ordinary must be parties. The cases of chapelries made distinct, and to which districts have been attached under the Church Building Acts, are of course special exceptions.

General right of incumbent to nominate.

Lord Northington further says, the consecration is express as a chapel of ease; that is sufficient to support the vicar's right to the nomination. Afterwards, in the same instrument, the archbishop gives the nomination to the inhabitants of Armley and Wortley, which he could not do of his own authority; and it is observable, he gives it to the most improper people, as they were sectaries. There is no pretence in this case of any agreement between patron, parson and ordinary, either with or without a compensation to the vicar. The declaration of the vicar at the time of the consecration could not bind his successors, if it did himself: nothing he could do would have that effect, unless it was by a proper deed under his hand. The nominations to the curacy by the inhabitants are so many instances of usurpation, but they did not take away the right of the succeeding vicar to nominate upon a vacancy.

Qualifications of a lecturer.

No person is to be received or admitted as lecturer or reader in divinity, except he be licensed by the bishop or archbishop of the diocese where he is to be placed, under their hands and seals; or by one of the universities, under their seal; and except he shall first subscribe to the three articles concerning the king's supremacy, the Book of Common Prayer, and the Thirty-nine Articles; and any bishop licensing without such subscription shall be suspended from giving licenses to preach for twelve months; and by 37th canon, none licensed as above are to be permitted to preach, &c. or exercise any ecclesiastical function, unless they first consent and subscribe to the three articles above-mentioned, in the presence of the bishop of the diocese wherein they are to exercise such functions, &c.

By 13 & 14 Car. 2, c. 4, s. 19, (the last Act of Uniformity,) no person shall be allowed or received as lecturer, until he shall, in the presence of the archbishop of the province, bishop of the diocese, or guardian of the spiritualties, in case the see be void, read the Thirty-nine Articles men-

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tioned in the statute, 13 Eliz. c. 12, with declaration of his unfeigned assent to the same; and every person who shall be appointed and received as a lecturer, &c. shall, the first time he preaches, (before his sermon,) openly and publicly and solemnly read the common prayers and service appointed to be read for that time of day, and then and there publicly and openly declare his assent unto, and approbation of the said book, and to the use of all the prayers, rites and ceremonies, forms and orders, therein contained; and shall, upon the first lecture day of every month afterwards, as long as he is lecturer, then openly, &c. read the common prayer, &c. and after such reading openly, &c. before the congregation there assembled, declare his unfeigned assent unto the said book as aforesaid; and, neglecting or refusing to do so, shall be disabled to preach the said sermon in the said or any other church, &c. until he shall openly, &c. read the common prayer and service appointed by the said book, and conform in all things therein prescribed, according to the purport and true intent of the act.

County and borough justices are empowered, upon the certificate of the ordinary, to commit any person, disabled as last mentioned, preaching any sermon or lecture, while he shall continue so disabled, to the county or other gaol for three months.[o]

Powers of trustees of a lectureship.

Trustees of a lecture to be preached at a convenient hour may appoint what hour they please, and may vary their appointment;[p] but this must be subject to a provision of the above statute,[q] which declares that when any sermon or lecture is to be preached, the common prayers and service in and by the said book appointed to be read for that time of the day shall be openly, publicly and solemnly read by some priest or deacon in the church, chapel, or place of public worship, where the said sermon or lecture is to be preached, before such sermon or lecture be preached, and that the lecturer then to preach shall be present at the reading thereof. If therefore the trustees were to appoint a time for the lecturer to preach, when it would be impossible for the service to be first read, it seems that he might refuse.[r]

License by the bishop is revocable.

It has been decided that a license granted by the bishop to a clergyman, to officiate as minister of a proprietary chapel, is revocable at the will of the bishop, and that without any particular cause assigned; but that he has an absolute right of his own exclusive discretion to revoke

[o] Same act, sect. 21.
[p] *The King* v. *Bathurst*, 2 Black. Rep. 210.
[q] Sect. 22.
[r] See a case mentioned in 2 Burn's E. L. 401, from Serjt. Hill's MS. notes.

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such license, and that the exercise of such discretion is not examinable in the Ecclesiastical Court.[s] After what has been already observed as to the granting a mandamus to the bishop to compel him to license, and the words of Lord Ellenborough in the case of *The King* against *The Bishop of London and Archbishop of Canterbury*, this case appears a very strong one; for Lord Ellenborough appears to have considered it necessary for the bishop to state some reason for his refusal; and the statement which satisfied the court has been already mentioned; but in the case of a revocation, which would seem to require stronger grounds to support it, Dr. Lushington considers that a proper motive in the bishop is to be inferred without inquiry. Dr. Lushington expressly says, that the mode in which the license is worded[t] could not affect the law of the case; and there seems to be no intelligible principle upon which the case of a minister of a proprietary chapel would be distinguishable from that of any of those ministers whom we have spoken of in the present chapter.

The observations of Dr. Lushington are principally confined to the case immediately before him; but some general remarks would appear to carry the case much further, and make it applicable to the case of all clergymen, who being neither rectors, vicars, perpetual or stipendiary curates, officiate by virtue of the bishop's license. "I think," he says, "that the principle on which the law of the Church of England stands in this matter is this: no clergyman whatever of the Church of England has any right to officiate in any diocese, in any way whatever, as a clergyman of the Church of England, unless he has a lawful authority so to do; and he can only have that authority when he receives it at the hands of the bishop, which may be conferred in various ways: as by institution (in the case of a benefice); by license, where the party is a perpetual curate; and by license, when the clergyman officiates as stipendiary curate. I do not think it requisite to consider what is done in the case of rectors, vicars and perpetual curates, because these persons are now all regulated by the law of the land. The point I have to consider is this: what is the nature of a proprietary chapel, unconsecrated, and what is the nature of a license granted by the bishop to the minister of such a chapel? by what power and authority he grants such license; and whether, on the ground of having granted such license, he is estopped from remedy by himself, except in the mode required by law?

[s] *Hodgson* v. *Dillon*, 2 Curteis, 391.
[t] The license in this case was absolute, and not durante benè placito.

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Proprietary chapels.

"I need not state that the ancient canon law of this country knew nothing of proprietary chapels or unconsecrated chapels at all. The necessity of the times, the increase of population, and want of accommodation in the churches and chapels in the metropolis, and other large towns, gave rise to the creation of chapels of this kind, and to the licensing of ministers of the Church of England to perform duty therein. The license granted by the bishop on such occasions emanates from his episcopal authority. He could not, however, grant such a license without the consent of the rector or vicar of the parish,[u] for the cure of souls belongs exclusively to the rector or vicar. Here is the consent of the rector obtained, not to an ordinary license to a stipendiary curate, but to confer a nondescript title, that of minister of an unconsecrated chapel.

"The bishop, therefore, confers this license by virtue of his episcopal authority. What is to prevent his revocation of it at any time he may think fit? Is this a license which will not only be good against him, but is it to prevail against any successor who may come after him? It is a license granted only from the exigency of the moment, and for no other reason whatever. Supposing, by new powers being given under the Church Building Acts, other churches and chapels were to be consecrated according to the law of the Church of England throughout the land, would not the necessity for these unconsecrated chapels cease; and, under such circumstances, could the grantee of such a license continue to officiate, in direct opposition to the bishop?

Query, can a bishop by any means estop himself from the power of revoking.

"It is not necessary to examine the expediency of vesting such a power in the bishop; the question is, what is the law? I think it is incumbent upon those who assert the affirmative, that is, who assert that it is in the power of the bishop to confer a permanent right, as against himself, to show that such a power has been conferred by the ecclesiastical law. I am of opinion that no such power has been granted, that it is not even in the power of the bishop himself to estop himself; but that he is bound, according to the exigency of the case, to revoke such a license, if he thinks that the good of the Church requires it.

"I have heard no authorities cited on one side or the other, which require the examination of the court to ascertain their applicability; and *on general principles, I am of opinion that the bishop has authority to revoke such a license*

[u] But it does not appear that the consent of the rector, &c. is necessary to enable the bishop to license, but only that a license is nugatory, if that consent is afterwards withheld. See *ante*.

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as this, according to his own discretion; he has exercised that discretion in this case, a discretion not examinable by me."

Section X.

Of Stipendiary Curates.

Curate is a word of ambiguous signification. In its first and most proper sense it denotes any minister who has the cure of souls. In its second and most common sense it signifies a minister, who, not being either rector or vicar, exercises the spiritual office in a parish under either of those persons. Where all the profits of the benefice, the tithes both great and small, are appropriated, so that both the rector and the vicar are or may be lay, there the curate is perpetual, being the clerk employed to officiate by such impropriators, and consequently he is in the same situation as a vicar was formerly; and such are those of whom we have spoken in a former section. But where the rector or the vicar are ecclesiastical persons, and have the tithes, either great or small, there the curate is temporary only, that is to say, removable upon divers causes and contingencies; and he is usually termed stipendiary, as being employed by such rector or vicar at a fixed stipend, either as an assistant to him in the same church, or as officiating for him in his absence in the parish church; or it may be in a chapel of ease within the same parish, belonging to the mother church.

Curates.

Perpetual.

Stipendiary.

For the purpose of becoming a curate in any diocese the license of the bishop of such diocese is necessary; for it is directed[x] that no curate or minister shall be admitted to serve in any place, without examination and admission of the bishop of the diocese or ordinary of the place having episcopal jurisdiction under his hand and seal; having respect to the greatness of the cure and the meetness of the party. Before this license is granted to the curate, he must subscribe the Thirty-nine Articles and the three articles of the thirty-sixth canon; must declare his conformity to the United Church of England and Ireland; and must take the oaths of allegiance, supremacy and canonical obedience; which latter is—"I, A. B., do swear that I will pay true and canonical obedience to the Lord Bishop of —— in all things lawful and honest. So help me God." He must also send to the bishop the following papers:

Must be licensed.

Requisites before license will be granted.

[x] Canon 48.

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1st. A nomination, varying in form according as the incumbent nominating may be resident or nonresident.[y]

2nd. Letters of orders of deacon and priest.

3rd. Letters testimonial, to be signed by three beneficed clergymen.[z]

It is also recommended that the clergyman nominating be not a subscriber to the testimonial. On the receipt of these papers the bishop, if he be satisfied with them, will either appoint the clergyman nominated to attend him to be licensed, or issue a commission to some neighbouring incumbent. The license will be sent by the bishop to the registry office, and from thence forwarded to the churchwardens.

Serving in the diocese.

A curate is expected to remain in the diocese of the bishop by whom he was ordained for two years at the least; and if he should desire to remove into another diocese before the expiration of such term, it is proper that he should apply to the bishop of that diocese, and also to the bishop who ordained him, for their sanction, stating the special circumstances that induce him to apply.[a]

The law as to stipendiary curates regulated by 1 & 2 Vict. c. 106.

With the exception of what has been here mentioned, it may be stated that the whole law respecting stipendiary curates, the mode of their appointment, and the stipend to be paid to them, is entirely dependent on and regulated by the recent statute[b] passed in the year 1838; by which act the former statute,[c] by which such appointments and stipends were regulated, is altogether repealed. Several provisions, however, of the former act being transferred to and consolidated with the present, little else therefore will be necessary than here to give a digest of that part of the statute which relates to this subject.[d]

Cases where bishop may appoint or require the appointment of a curate.

As to those cases in which a curate must necessarily be appointed, and may be appointed by the bishop absolutely, it is enacted, that—

Incumbent non-resident.

1. If any spiritual person, holding any benefice, does not actually reside thereon nine months in each year (unless he has the license and consent of the bishop to perform the duties of such benefice, being resident on another of which he is incumbent, or has a legal exemption or license for non-residence), or if, for a period exceeding three months altogether, or at several times in any one year he should be absent from his benefice, without leaving a curate duly licensed to perform the duties; or—

[y] See App. No. II. [z] Ibid.

[a] For the foregoing, see Hodgson's Instructions, pp. 12, 13.

[b] 1 & 2 Vict. c. 106. [c] 57 Geo. 3, c. 99.

[d] As to all the remainder of this section, see 1 & 2 Vict. c. 106, ss. 75—102, both inclusive.

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2. If for a period of one month after the death, resignation or removal of his curate, who may have been performing the duty, he should neglect to notify the same to the bishop; or—

3. If for a period of four months after the death, resignation or removal of such curate, he should neglect to nominate to the bishop a proper curate, in either of these three cases the bishop may appoint and license a proper curate, with such salary as is allowed by the act, and of which we shall presently come to speak, to serve the church or chapel, with respect to which such neglect or default shall have occurred.

Curate in such cases required to reside.

In each of these cases the license must specify whether or not the curate is required to reside within the parish or place; and if he is not required to reside therein, then the license must specify the grounds upon which such non-residence is permitted; but even in these cases the distance of his residence from the church or chapel which he is so required to serve, must not exceed three miles, except only in cases of necessity, to be approved of by the bishop, and specified in the license.

And so if appointed by incumbent.

So in the case of incumbents non-resident, with consent or license of the bishop, and by whom a proper curate may have been appointed, it is enacted, that such curate shall be required by the bishop to reside within the parish or place where the benefice is situated; or if there is no convenient house there, then within three statute miles of the church or chapel to which he is licensed; except as before, in cases of necessity, to be approved of by the bishop and specified in the license; and such allowed places of residence must also be specified in the license.

Where duty has been inadequately performed.

How ascertained.

A 4th case, in which a curate may be appointed absolutely by the bishop is, that where the ecclesiastical duties of any benefice are inadequately performed, and in order to ascertain whether or not this may be the fact, the bishop is empowered, in any case where he shall see reason to believe that such duties are improperly performed, to issue a commission to four beneficed clergymen of his diocese; or if the benefice be his peculiar, and situate in another diocese, then to four such clergymen of such last mentioned diocese, of whom one shall be the rural dean, if any, of the district wherein such benefice is situate, directing them to inquire into the facts of the case; to which commissioners the accused incumbent may add one other, who must be an incumbent of a benefice within the same diocese; and if the majority of such commissioners shall report in writing under their hands to the bishop that in

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their opinion the duties of such benefice are inadequately performed, he may, by writing under his hand, require the person holding such benefice, although actually resident or engaged in performing the duties thereof, to nominate to him a fit person or persons, with sufficient stipend, to be licensed by him to perform, or to assist in performing, such duties, specifying therein the grounds of such requisition; and if the person holding such benefice should neglect to make such nomination for three months, after being required so to do, the bishop may appoint and license a curate or curates, as the case may seem to him to require, with such stipend as he may think fit, not exceeding the stipends allowed in cases of non-residence, of which we shall presently come to speak; nor, except in cases of negligence, exceeding the half of the net annual value of the benefice; and the bishop is to cause a copy of every such requisition, and of the evidence on which the same is founded, to be forthwith filed in the registry of his court.

Stipend in such cases.

Appeal by incumbent.

An appeal is given to the archbishop by the person holding such benefice, who may conceive himself aggrieved by this proceeding, but such appeal must be made within one month after service upon him of the requisition, or of the appointment or license of the curate, and the archbishop may approve or revoke such requisition, or confirm or annul such appointment, as the case may be.

Curate to be appointed in large benefices.

The next cases provided for by the statute are those of the large benefices, in which the bishop is empowered to require the appointment of a curate in addition to the resident incumbent, in certain cases where the circumstances of the parish may seem to require it.

Of what value and population.

As whenever the annual value of any benefice into possession of which the incumbent shall have come subsequent to the 14th of August, 1838, (the time of the passing of the act,) shall exceed 500*l.*, and the population amount to 3000; or where, although the population may be less than 3000, there is a second church or chapel within the same benefice, not less than two miles from the mother church, and with a hamlet or district connected with it containing 400 persons.[e]

Although incumbent is resident.

In either of which cases the bishop is empowered to require the person holding such benefice, although resident thereon and engaged in performing the duties, to nominate a curate to be licensed; and in default of his complying

[e] In either case the annual value of the living must exceed 500*l.*, which, though somewhat doubtful from the words of this part of the section, is evident from the proviso that the curate's salary should in no case exceed one-fifth of the annual value.

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with such requisition within three months after it has been delivered to him, or left at his last place of abode, the bishop is empowered to appoint and license a curate, with such stipend as he may think fit, not exceeding the stipend specified in the act for such cases, and not in any case exceeding one-fifth of the net annual value of the benefice. And in these cases, as in the last mentioned, an appeal is given in the same manner to the archbishop.

Appeal.

But the most important sections of this act, so far as relates to stipendiary curates, are those by which the amount of their stipend in each case is regulated.

Amount of stipends to curates.

In the case of non-resident incumbents, the bishop is not only empowered, but required to fix the stipend for the curate according to the scale provided for each case by the act; and every license to a stipendiary curate, whether the incumbent is resident or not, must specify the amount of his stipend; and, in case of any dispute between the incumbent and his curate respecting payment of the stipend, or of the arrears, the bishop is summarily and finally to hear and determine the same without appeal; and so in any case of wilful neglect or refusal to pay the stipend or the arrears, the bishop can enforce payment, and, as it seems, the compliance with his award and decision, by monition and by sequestration of the profits of the benefice.

Fixed by bishop.

And all disputes on this subject to be determined by him.

The statute 57 Geo. III. c. 99, which is repealed by the act now under consideration, contained a similar provision for adjusting disputes between an incumbent and his licensed curate by the bishop; and it was decided that that statute entirely ousted the common law courts of jurisdiction in disputes touching any stipend appointed by the bishop to a curate under that act, or the payment of arrears of such salary. The same would, *à fortiori*, be the case under the present act, the words of which are more stringent and particular, declaring the decision of the bishop to be final, and without appeal. And in that case, when it was urged in argument that the plea ought to have specified the subject-matter of the disputes, whether they related to the regularity of the appointment, the reasonableness of the amount of salary, or any other question, Mr. Justice Coleridge remarks—"The words of the statute are so large that there seems no kind of dispute which they would not include." And it was by the same case further decided, that, in an action of assumpsit by a curate against his rector for such stipend, a plea founded on the statute was properly pleaded in bar, and not in abatement; and that a special plea founded on the statute is sufficient, if it allege that disputes have arisen, and are

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depending, touching the stipend and the payment thereof, and the arrears thereof; and that the action is brought touching the stipend and the payment thereof, and of the arrears thereof, touching which disputes have arisen within the meaning of the statute, not further specifying the subjects of dispute.[f] All which, it will be observed, would be equally applicable to the cases henceforth arising under the present statute.

Incumbents exempted from the operation of this enactment.

But the exercise of this power by the bishop is thus far restricted, that he may not appoint to the curate of any benefice to which the spiritual person holding the same was instituted, &c. previous to the 20th of July, 1813, any stipend exceeding 75*l.* per annum, together with the use of the house of residence, gardens and stables, or 15*l.* in addition to the 75*l.* in lieu of the house of residence, &c., in case there is no house, or the bishop does not think it convenient to assign it to the curate.[g]

Scale of stipends where incumbent is non-resident.

Where the *incumbent is non-resident*, and shall have been *instituted since the 20th of July*, 1813, the bishop is to appoint a stipend for the curate according to the following scale:—

1. The whole annual value of the living, if that be less that 80*l.* per annum.
2. In no case, except as in the first, less than 80*l.* per annum.
3. If the population amount to 300, and the annual value of the living suffice, 100*l.* per annum.
4. If the population amount to 300, and the annual value be less than 100*l.*, the whole annual value.
5. If the population amount to 500, and the annual value suffice, 120*l.* per annum.
6. If the population amount to 500, and the annual value be less than 120*l.* per annum, the whole annual value.
7. If the population amount to 750, and the annual value suffice, 135*l.* per annum.
8. If the population amount to 750, and the annual value be less than 135*l.* per annum, the whole annual value.
9. If the population amount to 1000, and the annual value suffice, 150*l.* per annum.
10. If the population amount to 1000, and the annual value be less than 150*l.* per annum, the whole annual value.[h]

In all these cases it will be seen that the amount of the stipend is regulated by the numbers of the population, but

[f] *West* v. *Turner*, 6 Ad. & Ell. 614. [g] Sect. 83. [h] Sect. 85.

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in each of those cases it may be regulated also by the annual value of the benefice, for whenever that shall amount to 400*l.*, the bishop may assign to the curate, *if he is resident and serving no other cure*, 100*l.* per annum in any case, although the population shall not amount to 300; and in all the above cases where the population exceeds 500, and the annual value exceeds 400*l.*, the bishop may add 50*l.* per annum to the amount specified in the above scale, so that in the case of number 10 the curate's annual stipend may be fixed by the bishop at 200*l.* per annum; the highest stipend, as it appears, which, under any circumstances, can be required by the bishop.[1]

Where value of benefice exceeds 400*l.* per annum.

The amounts of the stipends specified in the above scale, according to the population, do not appear to be discretionary in the bishop, but are such as he is required to appoint. The addition, however, in the case of larger annual value, may be made or not at his discretion; but, although the amount of stipend, according to the above scale, may not *generally* be diminished, yet certain specified cases are excepted, in which the bishop is allowed to exercise his discretion.

Smaller stipends in certain cases.

As in every case where he shall be satisfied that the spiritual person holding the benefice is non-resident, or incapable of performing the duties from age, sickness or other unavoidable cause, and that from those, or from any other special or peculiar circumstances, great hardship or inconvenience would arise if the full stipend specified in the act should be allowed to the curate, he may, with consent of his archbishop, signified in writing upon the license granted to the curate, assign a less stipend to the curate than according to the above-mentioned scale, as he may think proper. But in every such case it must be stated in the license, that for special reasons the bishop has not thought proper to assign to the curate the full stipend directed by the act; and such special reasons must be entered fully in a separate book kept for that purpose in the registry of the diocese, which shall be open to inspection, with leave of the bishop, as in the case of application for licenses for non-residence.[k]

Where curate is engaged to serve at different benefices of one incumbent.

There is also another case specially mentioned in the act, in which the bishop is allowed, at his discretion, to appoint a less stipend than according to the above-mentioned scale; as where an incumbent, having two benefices, *bonâ fide* resides on one or other of them at different times of the year, so as to make up altogether the full *required term of residence* for a single benefice. An incumbent thus

[1] Sect. 86. [k] Sect. 87.

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residing is not, it seems, to be considered non-resident on either benefice; and if he shall employ a curate to perform the duties interchangeably from time to time upon the benefice from which he is absent, during his actual residence upon the other benefice, the bishop may at his discretion assign to such curate any stipend not exceeding what would be allowed according to the scale for the larger of such two benefices, nor less than what would be allowed for the smaller. And if an incumbent thus residing employs a curate or curates for the whole year upon each of such benefices, the bishop may assign to either or each of such curates any stipend less than that specified in the scale, at his discretion; and this without the consent of his archbishop being necessary, as in the cases of age, illness, &c. before mentioned.[l]

Diminished stipend where curate serves in two adjoining parishes.

If the bishop should find it necessary or expedient to license a spiritual person holding any benefice to serve as curate of any adjoining parish or place, he may, at his discretion, assign him a stipend not less than 30*l.* per annum below the stipend which would be allowed by the scale; and so, if the bishop should find it necessary or expedient to license the same person as curate for two parishes or places, the stipend assigned him for each of such curacies may be 30*l.* below the stipend which would be allowed by the scale, or less than such stipend by any sum not exceeding 30*l.*[m]

If stipend of the whole annual value, it is liable to all charges.

In every case where, according to the scale, the bishop shall have assigned to the curate a stipend equal to the whole annual value of the benefice, such stipend is to be subject to deduction for all such charges and outgoings as may legally affect the value of the benefice, and to any loss or diminution which may lessen such value, unless caused by the wilful default or neglect of the person holding the benefice;[n] and in those cases the bishop may, upon the application of the person holding the benefice, allow him to retain each year so much money, not exceeding one-fourth part of the annual value, as shall have been actually expended during the year in the repairs of the chancel or house of residence, and of the premises belonging thereto, and in respect of which the person holding the benefice would be liable for dilapidations.[o]

Provision in such case against dilapidations.

In like manner, where the annual value of a benefice does not exceed 150*l.*, the bishop may allow the person holding the same to deduct from the curate's salary so much money as shall have been actually expended in such repairs above the amount of the surplus remaining after

[l] Sect. 88. [m] Sect. 89. [n] Sect. 91. [o] Sect. 92.

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payment of the stipend, provided however that the sum deducted, after laying out such surplus, shall not in any year exceed one-fourth part of the stipend.[p]

Sum retained by incumbent not to be above a fourth of the stipend.

All agreements made between persons holding benefices and their curates, in fraud or derogation of any of the provisions of this act, and especially all agreements whereby any curate shall undertake or bind himself to accept any stipend less than that assigned him by his license, are actually void to all intents and purposes; so that such an agreement cannot be pleaded or given in evidence in any court of law or equity; and even where any such less payment has been made and accepted, and receipt or discharge given in pursuance of any such agreement, the curate and his personal representatives nevertheless are and remain entitled to the full amount of the stipend assigned by the license. And the payment of so much as shall be proved, to the satisfaction of the bishop, to remain unpaid, together with the full costs of recovering the same, as between proctor and client, may be enforced by monition or by sequestration, to be issued by the bishop, on the application of the curate or his representatives, provided however that such application be made within twelve months after such curate has quitted his curacy or died.[q]

Agreements for stipends less than by the scale void.

It does not appear from this provision of the act for how long a period the arrears of a stipend which has not been fully paid may be recovered; it is presumed therefore that any arrears might be claimed which had accrued within six years preceding, the recovery of which would not be barred by the Statute of Limitations. The receipt or discharge declared to be void appears to be such a receipt as upon the face of it purports to be for a less sum than that assigned by the license; but if a receipt should be given for the full sum assigned in the license, although a lesser sum had actually been paid in pursuance of some secret agreement between the incumbent and his curate, it does not appear that any parol evidence of this fact could be allowed to contradict the written receipt; so that the stringent provisions of the act in this respect may be, and, it is supposed, frequently are, evaded in this manner.

Effect of the last enactment.

The next provisions of this act with respect to stipendiary curates, are those which relate to their residence in parsonage houses of the benefice.

Where a curate has been licensed to any benefice, the incumbent of which is non-resident for four months in the year, and has been required by the bishop to reside in the house of residence, the bishop may assign him such house,

Residence of curates in parsonage house.

[p] Sect. 92. [q] Sect. 90.

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with the premises belonging to it, or any parts of them, without payment of any rent, and any portion of glebe land adjacent to the house, not exceeding four acres, at such rent as shall be fixed by the archdeacon or the rural dean of the district, and one neighbouring incumbent, and approved of by the bishop, during the time of such curate's serving the cure on the non-residence of such incumbent; and if in such a case the possession of the premises thus assigned is not given up to the curate, the bishop may sequester the profits of the benefice, until possession is given, and direct the application of the profits in such manner as is directed in case of sequestration for non-residence,[s] or he may remit the same, or any part thereof, as he may think fit.[t]

Taxes, rates &c. of parsonage houses in such cases.

Where the stipend, which has been assigned to the curate, is not less than the whole annual value of the benefice, and in addition thereto he has been directed to reside in the house of residence, he is liable to the same taxes, parochial rates and assessments, in respect of such house and premises, as if he had been incumbent. And in every other case where the curate resides in the house of residence by the direction of the bishop, the bishop may, if he thinks fit, order the incumbent to pay the curate all or any part of such sums as he may have been required to pay, and may have paid within one year ending at Michaelmas day next preceding the date of such order, for any taxes, parochial rates or assessments, as may have become due; and the bishop may, if necessary, enforce payment thereof by monition and sequestration.[u]

Curates, where benefice is sequestered.

Where a benefice is under sequestration, except for the purpose of providing a house of residence,[x] the bishop is empowered *and required*, if the incumbent does not perform the duties, to appoint and license thereto a curate or curates. If one curate only, his stipend not to exceed the highest rate allowed by the scale; if more than one, a stipend not exceeding one hundred pounds; such stipend or stipends to be paid by the sequestrators out of the profits. But one curate only can be appointed, unless the benefice has more than one church, or the population exceeds two thousand.[y]

Sequestrator to pay curate stipend.

Upon the avoidance of any benefice by death, resignation or otherwise, the sequestrator appointed by the bishop is to pay out of the profits to the curate or curates, appointed to perform the duties during the vacancy, such stipend as may be appointed by the bishop, provided it

[s] Sect. 54. [t] Sect. 93. [u] Sect. 94.
[x] As provided by 1 & 2 Vict. c. 106, s. 54. [y] Sect. 99.

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does not exceed the stipend above directed, and in proportion only to the time of the vacancy.[z] But if the profits of the benefice which come into the hands of the sequestrator during the vacancy, are insufficient to pay such stipend or stipends, then so much as shall remain unpaid shall be paid to the curate or curates by the succeeding incumbent, out of the profits of the benefice; the payment of which the bishop is empowered *and required* to enforce, if necessary, by monition and sequestration of the profits of the benefice.[a]

Payment of stipend during vacancy by succeeding incumbent in certain cases.

Having now considered in what manner a stipendiary curate is to be appointed and licensed,—in what cases he is to be employed,—in what manner, and according to what rate he is to be paid,—how such payment is to be enforced, and the matters relative to his residence on his curacy, it remains only to consider how his office is to determine, and by what causes or in what manner he may be removed from his curacy.

Review of the subject.

No curate is allowed to quit the curacy to which he has been licensed, without three months' notice of his intention so to do, given to the incumbent and the bishop, unless with consent of the bishop, signified in writing under his hand, upon pain of paying to the incumbent a sum not exceeding the amount of his stipend for six months, at the discretion of the bishop; such sum to be specified in writing under the hand of the bishop, and either to be retained out of the stipend, where a sufficient part thereof remains unpaid, or to be recovered by the person holding the benefice by action of debt.[b]

Curate's quitting his curacy.

Every curate, upon the vacancy of the benefice to the cure of which he has been licensed, and upon having six weeks' notice from the new incumbent admitted or instituted to the benefice, must quit and give up the curacy; and if he has been residing in the house of residence, he must, upon having such notice, give up possession thereof with the premises, provided that such notice must be given within six months from the time of such admission.[c] But in the case of all district churches and district chapelries, the license of the stipendiary curate, appointed to serve the chapel of such chapelry, shall not be rendered void by the avoidance of the church of the parish or district parish in which such chapel is situate; but such license is to continue in force, unless revoked by the bishop under his hand and seal, notwithstanding such avoidance. And this particular exception from the general rule appears to aid in removing any doubt, if such might otherwise have ex-

Curate to quit cure and parsonage house upon having six weeks' notice from new incumbent.

[z] Sect. 100. [a] Sect. 101. [b] Sect. 98. [c] Sects. 95, 96.

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isted, as to the cases to which the rule applies. It seems, therefore, that the new incumbent, upon his admission to a benefice, where a licensed curate was residing *as curate of the same church*, might remove that curate upon due notice, although he did not intend himself to reside on such benefice. In every other case except this last, the incumbent of any benefice, whether resident thereon or not, with the bishop's permission in writing, may require any curate who may have been licensed after the passing of the act[d] to quit and give up his curacy upon six months' notice. If the bishop refuse this permission to an incumbent resident or desirous of residing, he may appeal from such refusal to the archbishop; but if a non-resident incumbent is refused this permission by the bishop, that refusal is final.

Curate to deliver up parsonage house on notice.

And where the curate has been residing in the house of residence, the incumbent, with such permission from the bishop, or the bishop himself at any time, may, upon six months' notice in writing, require him to give up the same with the premises, and such portion of the glebe land as shall have been assigned to him; and if the curate should refuse to deliver up the premises, he shall pay to the person holding the benefice forty shillings for every day of wrongful possession, after service of such notice;[e] which penalty or forfeiture, being incurred by a person not holding a benefice, would be to be sued for and recovered in an action of debt.[f]

Distinction of the cases in which an appeal is allowed.

It will be observed, that in the case of an incumbent who should have been refused permission to give his curate notice to quit the house, premises or glebe, no such appeal to the archbishop is given as in the case last mentioned, the refusal of the bishop apparently being final. It has been suggested hereupon, that a difficulty might arise, if the bishop, having in both cases refused permission, the archbishop should, upon appeal, reverse his decision in the one case, in which only he has power to reverse it, the curate being thus dismissed from the curacy, but left in possession of the house of residence and glebe.[g]

The notices.

With respect to these notices, it may be recapitulated that a new incumbent must give six weeks' notice, and within six months after admission, such notices not being necessarily in writing according to the act; although it would probably in all such cases be better that they should be in writing. The notices in other cases, with permission of the bishop, or by the bishop himself, must be necessarily six months, and must necessarily be in writing.

[d] 14th August, 1838. [e] Sect. 96. [f] Sect. 117. [g] Rogers's E. L.

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But, in addition to these cases, a more summary power is given to the bishop of removing a curate at any time he may think proper; and all curates are thus made immediately subject to the bishop as well as to the incumbent; for the bishop is empowered, after having given the curate sufficient opportunity of showing reason to the contrary, summarily, and without further process, to revoke any license granted to any curate, and to remove such curate for any cause that he may think good or reasonable; but the curate may, within one month after service upon him of the revocation, appeal against the same to the archbishop.[h]

Bishop may revoke licenses.

Appeal by curate.

The bishop who grants or revokes any license to any curate is to cause a copy of such license or revocation to be entered in the registry of the diocese; and an alphabetical list of such licenses and revocations is to be made out by the registrar of the diocese, and entered in a book, and kept for the inspection of all persons upon payment of three shillings; and a copy of every such license and revocation is to be transmitted by the registrar to the churchwardens or chapelwardens of the parish or place to which the same relates, within one month after the grant of such license or revocation, to be by them deposited in the parish chest; and for every such copy so transmitted, the registrar is entitled to demand a fee of three shillings from the incumbent. And in case the archbishop shall on appeal annul the revocation of the license, the bishop by whom the revocation may have been made shall, immediately upon receiving notice of that fact from the archbishop, order in writing that the copies of such revocation shall be forthwith withdrawn from the registry and parish chest; and that such revocation shall be erased from the list of revocations in the registry, which order is binding upon the registrar and churchwardens respectively to whom it is addressed.[i]

Registry of license and revocation.

Copies to be transmitted.

Fees.

[h] Sect. 98.

[i] Sect. 102.

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CHAPTER VIII.

ECCLESIASTICAL OFFICERS, SERVANTS, &c.

SECTION 1.

Chancellors and other Officers of Ecclesiastical Courts.

A VERY extensive subject might be opened under the present head, but it would necessarily be connected with a variety of subjects, which are quite foreign to the purposes of the present work. It will be sufficient, therefore, to give the different titles, and to point out very briefly the office of these parties respectively.

Chancellor, age and qualification.

The chancellor must be at least a master of arts or bachelor of civil law, so created in some university, of the age of six-and-twenty, and he is to hold the bishop's courts for him, and assist him in other matters of ecclesiastical law. Whatever causes therefore are triable in the Bishop's Consistorial Court are triable by him as judge;[a] but if one who is a divine, and not brought up to the study of the civil law, should nevertheless be appointed chancellor, this will not be a reason why the common law courts would grant prohibition in any cause tried before him, since it belongs to the spiritual court to examine the abilities of spiritual officers.[b]

Official principal and vicar-general.

The office of chancellor is said to include in itself two others, those of official principal and vicar-general.

The office of official principal of the Archbishop of Canterbury has, for a long time, been united with that of dean of the arches; and that large jurisdiction in ecclesiastical matters, which is now exercised by the dean of the arches, is exercised by him as official principal; for the jurisdiction of the dean of the arches is limited to the peculiars of the archbishop.[c]

Jurisdiction of official principal.

The original jurisdiction of the official principal of the archbishop is that which he has as judge of the peculiars of the archbishop, and that which he has by virtue of letters of request in such causes as are called arduous causes; of which matrimonial causes were always termed

[a] Canon 127. [b] 1 Burn's E. L. 290.
[c] 3 Black. Comm. 65; 1 Hagg. 48.

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the chief. His appellate jurisdiction is very extensive, including all manner of appeals from the chancellors, commissioners, officials, &c. of the bishops, deans and chapters, and archdeacons, in the whole province of Canterbury, for he is to the judges of those courts, what the archbishop is to the bishops, &c. whose courts they are: and as the only appeal from the archbishop is to the Queen, so from the decision of his official principal, the only appeal is to the judicial committee of the privy council.[d]

Of the vicar-general.

The vicar-general appears to have only what is called voluntary jurisdiction, that is, in matters which require no judicial proceeding, as in granting probate of wills, letters of administration, sequestration of vacant benefices, institution, &c.;[e] but where different offices have been usually held by the same party, it is difficult to define precisely in which right the jurisdiction may have been exercised; and this is the case with the vicar-general, for it seems to be doubtful whether he has any power as such to inquire into crimes and punish them.

Limits of jurisdiction.

The limits of a chancellor's jurisdiction will necessarily be those of the diocese of the bishop, whose chancellor he is; and whatever causes are triable in the consistorial court of that bishop, the chancellor is to try them.

Officials and commissaries.

Where an archdeacon has ecclesiastical jurisdiction, the judge of his court is usually called the official. And where any bishop or other corporation, &c. has ecclesiastical jurisdiction in a peculiar, the judge of such a court is usually called the commissary; but the office and duties of these officers, whatever may be their name, is the same as that of the chancellor; and from all of them there lies an appeal to the official principal of the archbishop.

Surrogates.

A surrogate is a deputy of an ecclesiastical judge for a special purpose, namely, that of granting licenses of marriage; and before granting any such license, he must take an oath before the ecclesiastical judge for the faithful performance of his office to the best of his knowledge, and must give a bond for 100*l.* for the due execution of his office. By the canon law he is to be some clergyman; and some other qualifications are declared necessary, such as skill in the civil and ecclesiastical law, &c., which, however, since they do not appear to be practically necessary in any way, are not now usually regarded.

Our notice of the offices of chancellors and other ecclesiastical judges is the more limited since the alteration in

[d] See 2 Lee, 316; 1 Hagg. 535, 537; 23 Hen. 8, ch. 9.
[e] See *Thorpe* v. *Mansell*, 1 Hagg. Com. 4.

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the mode of proceeding against clergymen charged with offences, in consequence of the Church Discipline Act, has transferred from them to the commissioners appointed by the bishop for the occasion, and to the bishop himself, that part of their jurisdiction which would have been most connected with our present purpose. It is moreover probable that, within a very short time, an important alteration may be made in all the inferior ecclesiastical courts, a bill having already been introduced for that purpose, and many of them will most probably be abolished.

Section 2.

Of Churchwardens.

What they are.

Churchwardens, as their name imports, are the proper guardians or keepers of the parish church, and their duties were originally confined to the care of the ecclesiastical property of the parish, over which they exercise discretionary powers for certain purposes.[f] But in addition to the duties which are incident to them in that character, several other duties have been cast upon them by custom or by particular statutes, such as are those which they have in connection with the overseers. Of these, however, some are foreign to the general scope and purpose of this work.

Perform the duties of sidesmen.

In the ancient episcopal synods, the bishops were wont to summon divers men out of each parish to give information of the disorders of the clergy and people, and these, in process of time, became standing officers, called synodsmen, sidesmen, or quest men;[g] and the whole of the office of these persons seems by custom to have devolved upon the churchwardens.

To what extent they are a corporation.

Churchwardens cannot, strictly speaking, be considered as a corporation; for they cannot, except by custom, as in London, or by their particular charter, as at Wallingford, or when authorised by statute, purchase lands or take by grant. But they are a corporation, or *quasi* corporation, for certain purposes, and, it is said, that as the parson of the church is a corporation for the taking lands for the use and benefit of the church, and not capable of taking goods or personalty[h] in that behalf, so the churchwardens are a corporation to take money or goods or other personal estates for the use of the church, but are not

[f] 1 Black. Comm.; 1 Hagg. 173.
[g] Kennett, Par. Ant. 649.
[h] But this is not now true universally.

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enabled to take lands. But even with respect to the personal property, which they are capable of purchasing or taking in succession for the use of the parishioners, they are little else than a name to sue by, and in all actions, &c. by them, it must be laid *ad damnum parochianorum*.[i] In this manner, however, they may sue for the goods of the church, and bring an action of trespass for them, and this whether against the parson or a parishioner, and whether for goods taken in the time of their predecessors, or in their own time.[k]

In what way they ought to sue.

But although they may thus take goods, yet as they are a *quasi* corporation for the benefit, and not for the prejudice of the parish, they cannot dispose of any of the church goods without the consent of the majority of the parishioners legally declared in vestry, and the license of the ordinary.[l] The parishioners are in fact the owners, the churchwardens being temporarily entrusted by them with the custody, so that if the churchwardens should dispose of them, the parishioners would have no remedy to recover them, for it would be as if they had themselves parted with the goods.[m] And it is the fault of the parishioners if they choose and trust unfit persons.

Their power over the goods of the church.

That churchwardens are a corporation, so as to bind their successors and the parishioners whom they represent in matters beneficial to the church and parish, is well exemplified by the rather singular case of the parish of Hammersmith, where the wife of the incumbent Dr. Martin, having been annoyed by the ringing of the five o'clock bell, and being about to remove in consequence, it was agreed between him and the churchwardens, that the former should, at his own expense, build a cupola, and erect a clock and new bell; in consideration of his doing which, the ringing of the five o'clock bell should cease during the lifetime of himself and wife. Some years afterwards, however, and after the cupola, &c. been erected, the bell was again rung by order of the churchwardens, but Dr. Martin obtained an injunction from the Court of Chancery.[n] It appears however from the judgment, that in granting this injunction, the court was much influenced by the fact that what had been done was, on the whole, beneficial for the parish, and as such a matter must always be open to doubt, it is suggested that it would be very

[i] Viner's Abr., Churchwardens.
[k] See Rogers's E. L., Churchwardens.
[l] Prideaux, 135; Ayl. Parer. 171.
[m] Prideaux, 136; Vin. Abr. Churchwardens.
[n] *Martin* v. *Nutkin*, 2 P. Wms. 267.

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unsafe to deal with churchwardens in a similar manner, for if the agreement could not be clearly proved to be beneficial to the parish, it rather appears that it could not be supported.

Persons disqualified for the office.

Aliens, papists, Jews, children under ten years of age, and persons having been convicted of felony, are absolutely disqualified to serve as churchwardens.[o]

Persons not compelled to serve.

Peers of the realm, clergymen, members of parliament, attorneys of the King's Bench, *attorneys' clerks* in the several courts of law, physicians, surgeons and apothecaries being free of their corporation or company, and duly qualified to practise as such according to the statutes, teachers in pretended holy orders, who are teachers of a congregation, and duly qualified by 1 Will. III. c. 18, serjeants, corporals, drummers and private men of militia, from the time of their enrolment to their discharge, commissioners, assistant commissioners or officers of customs, persons employed in collection or management of accounts for revenue of customs, clerks or persons acting under them, all persons who have prosecuted a felon to conviction for an offence in the parish where they would have been chosen, all these are exempted from being chosen or appointed to bear the office of churchwardens;[p] but with respect to those persons whom we have here mentioned as exempt, it does not appear that they are ineligible, and they may serve such office if they are willing. And if any dissenter from the Church of England shall be appointed churchwarden, and have any scruple to take the office, he may appoint *a deputy, provided such deputy be duly approved.*[q] But it appears now to be determined, that a Quaker would not be compelled to undertake the discharge of this office, either by himself or by deputy. One Theobald, a Quaker, having been cited for this purpose by the Ecclesiastical Court, set forth in a petition his various conscientious scruples which prevented him from undertaking the office, which applied equally, as he alleged, to the case of a deputy, because *qui facit per alium facit per se.* Dr. Phillimore, sitting for the judge of the court, observed that he was not aware of any authority in which any court in a contested suit had compelled a Quaker to take upon himself the execution of such an office; and alluded to the various duties which a churchwarden was called upon to perform, and which it would be impossible

Dissenters.

Quakers not compelled to serve.

[o] 1 Hagg. R. 9, 10.

[p] 1 Burn's Eccl. Law, 398; 2 Rol. Abr. 272, 368; 6 & 7 Will. 3, c. 4; 10 & 11 Will. 3, c. 23; 42 Geo. 3, c. 90; 9 Geo. 4, c. 76, s. 2; Rogers's E. L. 219.

[q] 52 Geo. 3, c. 155.

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for a Quaker to perform with a clear conscience; and he more particularly referred to the case (hereafter mentioned) where it had been held to be a justification of an assault in a churchwarden, that he took off a man's hat who was wearing it during Divine Service: whereas a Quaker would not only not take off the hat of another person, but it would be part of the formal discipline of his caste to wear his own. He added, "I infer from the dictum of Lord Stowell in the case of *Anthony* v. *Seager*, that there is a discretion in the court whether it should feel itself called upon to enforce the performance of these duties. I do not mean to say that all dissenters are exempted, nor to specify whether any, or, if any, what class are exempted. If the case comes before me, it will be time to distinguish according to circumstances and facts; but the Society of Friends are known,—they are a marked and peculiar caste,—and, having the means of knowing the conscientious scruples of this sect, a judge of an ecclesiastical court ought seriously to pause, not only before he attempts to violate the religious scruples of this class of persons, but also for the purpose of asking himself whether he can conscientiously admit into the bosom of our Church persons who are disqualified from obeying her directions, and giving full force and effect to her institutions and ordinances. The parish must proceed to another election."[r]

From this case it may be inferred that, notwithstanding the provisions of the statute before mentioned, directing that dissenters may, if elected, appoint a deputy, it is uncertain whether the court would compel any one so to do; for it certainly is not easy upon principle to discover any grounds why the indulgence thus conceded to the Quaker should be withheld from other dissenters, whose scruples may be equally conscientious.

General rule that all parishioners must serve if chosen.

With these exceptions it may be stated generally, that every parishioner must serve the office of churchwarden, if legally chosen into it; nor is it essential to constitute a person parishioner that he should be actually residing within the parish; for if he occupy a farm, or be partner in a house of trade situate within the parish, he will be equally considered as a parishioner.[s] And if a person be in other respects eligible, it appears that the circumstance of any ordinary infirmity would not be allowed as an excuse to exempt him from serving. Thus deafness seems to have been considered as an insufficient cause for ex-

[r] *Adey* v. *Theobald*, 1 Curteis, 447.
[s] R. v. *Poynder*, 1 Barn. & Cres. 178; *Attorney-General* v. *Forster*, 10 Ves. 3 3.

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emption.[t] And where one had been chosen churchwarden and had been excused upon payment of a fine, and another had then been chosen in his stead at the same vestry meeting, it was held that the person secondly chosen was bound to serve, and that the circumstances under which he was chosen did not make it optional with him whether he would serve or not.[u]

Number of churchwardens.

The 90th Canon, which prescribes the mode of choosing churchwardens, speaks of them in the plural number; and in all statutes where they are mentioned, it is invariably in the plural number; yet a custom will prevail, even where opposed to the words of the canon; and if there is a custom in a parish that there shall be only one churchwarden, it may be good for the reason that such a custom might have existed before the canon, and in that case could not have been destroyed or varied by it. But a custom that there should be no churchwardens is necessarily bad.[v]

Election of.

Having thus defined what churchwardens are, and who may be appointed to the office, and become qualified to act, we proceed to speak of the method of their election.

How chosen.

It is directed by the 90th Canon, that churchwardens shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one and the parishioners another; without which joint or several choice none shall take upon themselves to be churchwardens. But this canon prevails only in the absence of any custom to the contrary; and it may be doubted whether the canon can be taken to be any thing more than declaratory of the custom, or of the common law, at the time when it was made; for by Coke, Chief Justice, a convocation hath power to make constitutions for ecclesiastical things or persons, but they ought to be according to the law or custom of the realm; and they cannot make churchwardens that were eligible to be donative, without act of parliament; and the canon is to be intended where the parson had the nomination of a churchwarden before the making of a canon.[x] And it has been the opinion of great authorities, that by the common law the right of choosing both the churchwardens was in the parishioners, and that the parson only nominated by custom; but this is opposed to the opinion and decision of Park, J. in a case tried before him at the Croydon Summer Assizes in 1829; for

[t] 3 Phil. 165.
[u] *Birnie* v. *Weller and another*, 3 Hagg. 474.
[v] *R.* v. *Inhabitants of Hinckley*, 12 East, 361.
[x] Godol. 162.

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in that case the issue was to ascertain whether the right of election was in the parishioners, to the exclusion of the minister; and it was there held that in general the minister and the parishioners are to choose the two churchwardens; and if they do not concur, then the minister is to choose one and the parishioners the other; and though the evidence established that, generally, for upwards of 200 years the minister and parishioners concurred, and there was no evidence that the minister had ever separately appointed one, still this was not enough to support a supposed custom, in exclusion of the minister, because their long concurrence was not sufficient to affect the general right.[y] This decision, however, would only seem to show the necessity that the custom must be clearly and satisfactorily proved; for it is certain that at the present time the right of choosing churchwardens is wholly regulated by custom, which may in some cases have existed independently of the canon, and probably, in many other cases, sprung up in consequence of it; and the only question could be, what is the customary or common law method that is to prevail in the absence of any special custom satisfactorily proved, and that customary method, according to the decision just mentioned, is the same as that directed or affirmed by the canon.

Special methods of choosing by custom.

In some parishes, as in London, both the churchwardens are appointed by the parish;[z] in some others the lord of the manor appoints one; in others a select vestry or particular number of parishioners appoint one, or both; and in others the parson appoints one and the two old churchwardens the other;[a] all these customary exceptions from the general rule affirmed by the canon, must, as we have already observed, be satisfactorily shown.[b] And in all cases where the custom is disputed, the question must be tried by the common law courts, the spiritual courts having no jurisdiction.[c] Whenever the right of election is in the parishioners, it is to be exercised by the vestry, and the parson, it is said, cannot intermeddle in the election.[d] But unless there is an express custom to exclude the parson, there seems no reason why he should not be present there, as upon other occasions, although he should have already nominated one churchwarden.[e]

To be chosen in vestry.

When curate may choose.

Where the parson has the right to nominate one churchwarden, a curate stands in his place, and may make the

[y] *Slocombe* v. *St. John*, Croydon Summer Assizes, 1829.
[z] R. v. *Martin*, 1 Ld. Raym. 138.
[a] Godol. 153; 2 Inst. 653; 1 H. Bla. 28; 1 Mod. 182.
[b] *Slocombe* v. *St. John*, ante. [c] 2 Rol. Abr. 287.
[d] 2 Stra. 1045. [e] Rogers's E. L. 217; vide post, Vestry.

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presentment, unless the parson should be under sentence of deprivation, in which case the right to choose both results to the parishioners.[f]

Election of, how conducted.

The method of conducting the election by the parishioners is similar to that by which all other matters in vestry are determined, and of which we shall have to speak hereafter,[g] but the proper method of conducting such an election, especially in relation to the conduct of the minister, has been so clearly explained by Lord Denman in a recent case, that no better guide can be given than in the words of that judgment. "We think the proper place to elect churchwardens is some convenient place in the precincts of the church, and that the rector has a common law right and authority to preside at such election, as being the functionary who is at the head of the parish for ecclesiastical purposes; and though the churchwardens when they are once elected are the temporal officers of the parish, yet they are so far connected in ecclesiastical matters, that the rector has a clear and undisputed right to interfere in bringing them into existence.[h]

"There was another objection made during the argument, namely, that the chairman, having the casting vote under the 58 Geo. III. c. 69, might, from that circumstance, in many cases, nominate both the churchwardens. There is no doubt he may vote as a parishioner, the act of parliament giving him that privilege; and if any objection arises on this head, that objection can only be met by saying that parliament itself should have guarded against that inconvenience, but as it has not, I apprehend this court cannot interfere with the discretion of the chairman, when presiding at such an election."[i]

Proceedings of election may be regulated by custom.

And custom may regulate such proceedings; as, if there be a custom to close the poll for the election at some particular time, and that a reasonable time, it is good: and the parishioners must tender their votes within it.[k]

If poll is taken, all rate payers may vote.

Two sets of candidates having been proposed for churchwardens, the inhabitants in vestry assembled proceeded to the election. A show of hands was taken, and on behalf of those whom it appeared to be against, a poll of the whole parish was demanded. It was then decided by those assembled that a poll should not be taken of the parishioners at large, but of the inhabitants then present only; and during the time the poll was so taken the doors

[f] 2 Stra. 1246; Carth. 118.
[g] Book VII. Ch. I.
[h] For mode of conducting such meeting, see post, Book VII. Ch. I.
[i] *Reg.* v. *D'Oyley*, 4 Per. & Dav. 60.
[k] *R.* v. *Bishop of Winchester*, 7 East, 573; see post, Book VII. Ch. I.

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were closed by order of the chairman; several rated inhabitants of the parish were said to have been excluded, and knocked for admission, but were not admitted until the poll was over.

The only question in dispute stated by Sir J. Campbell was, whether the poll ought to be taken of those present only, or of all other rated inhabitants who might choose to come in and record their votes. And it was said by Denman, C. J. and Littledale J.; the law is quite clear that if a poll is taken, all the rated inhabitants have a right to come in and record their votes; but there is nothing to show in this case that the result would have been different if all the parish had come in, nor does it appear that the effect of closing the doors was to exclude any single parishioner from voting.[l]

Legality of election of, to be tried by the common law courts.

And it may be stated generally, that the legality or illegality of an election of churchwardens will be determined by the courts of common law,[m] in the same manner as other elections of the same character, and this upon application for a mandamus; and not only the legality of the election, but also of the votes given at it. And if the minister, or the parishioners, or the parties by whom the election is to be made should neglect to elect or nominate churchwardens, the ordinary cannot interfere; but the remedy is in the same manner, and they would be compelled to do so by a mandamus.[n]

How the question of a wrongful election may be tried.

So where it is contended that churchwardens have been improperly nominated or elected, the most proper and convenient course would seem to be for the party complaining of such election to apply for a mandamus commanding the rector and churchwardens, or such of them to whom the same should of right belong, to convene a meeting in vestry of the inhabitants for the election of a churchwarden for the remainder of that year. This course having been taken, and it appearing satisfactorily to the court upon affidavits that the proceedings of the election had been irregular, the court granted a mandamus to such effect, Lord Denman observing, there is no other remedy in this case so far as I can see; no mode of trying the right by action, because the office is not one of profit. If there has been an improper election, it is not desirable that the rates should remain in the hands of those who may have been parties to such wrongful election, if the election be void, still there are circumstances which render

[l] *Reg. v. Rector, Churchwardens, and Parishioners of St. Mary, Lambeth*, 3 N. & P. 416.

[m] 7 Ad. & Ell. 259; Burn, 1420. [n] 2 Barn. & Ad. 197.

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it fit that the parties should make a return, and show how it is maintainable; the matter may then be put into a proper train of inquiry. I give this as my opinion, because I do not at present see any other mode of correcting that which may have been an improper proceeding. And in this case Sir William Follett having referred to *Anthony* v. *Seager*, as showing that resort might be had to the Ecclesiastical Court, Littledale, J., observed, I do not see my way so clearly to any other remedy, as to say that a mandamus ought not to go.[o]

We shall hereafter have occasion to speak more particularly of the churches and chapels built under the different acts of parliament passed for that purpose; but we must here observe, that the mode of electing church or chapelwardens is directed differently under each of those acts. For the mode originally pointed out in the case of churches built under the 58 Geo. III. c. 45, for electing churchwardens, was repealed in the following year by the 59 Geo. III. c. 134, and by the latter act it was directed,[p] that in every district, parish, or division of any district, parish, or parish chapelry, or consolidated chapelry, in which any church should be built, acquired, or appropriated under the provisions of either of those acts, in which there should be no distinct vestry belonging to such district, a *select vestry*, consisting of so many persons as should be directed by the commissioners in that behalf, should be appointed by them with the advice of the bishop of the diocese, out of the substantial inhabitants of the district, or district or consolidated chapelry, for the care and management of the concerns of the church or chapel and all matters and things relating thereto: and that such select vestry should annually elect the church or chapelwarden to be named on the part of the parish or chapelry, and that they should also elect new members of the select vestry as vacancies might arise. The other churchwarden in these cases is to be appointed absolutely by the incumbent.

Churchwardens in the newly built churches and chapels.

But in respect to churches and chapels built under the provisions of the 1 & 2 Will. IV. c. 38, it is directed, that two fit persons shall be appointed churchwardens for every such church or chapel, to be chosen one by the incumbent for the time being, and the other by the renters of pews.[q]

And in the case of chapels of ease, which are made independent under the powers of this latter act, it is directed

[o] *R.* v. *Rector of Birmingham, &c.* 7 Ad. & Ell. 254.
[p] Sect. 30.
[q] 1 & 2 Will. 4, c. 38, s. 16.

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that churchwardens shall be chosen, one by the minister, and one by the persons exercising the powers of vestry in such new parish; and that *such persons shall be members of the Established Church*;[r] a limitation as to qualification which it is shown by daily experience might most usefully be extended to the case of all churchwardens wheresoever. And if the reasons given for the judgment in the case of *Adey* v. *Theobald* before quoted[s] should be carried out, the argument for disqualification in the case of dissenters would be quite as strong as for exemption.

Must be sworn into office.

Churchwardens, being thus elected, are in the next place to appear and present themselves to be sworn into their office, at the next visitation after their election, which shall be held either by the bishop, archdeacon, or other ordinary, and until they are so sworn they can do no legal act; but the old churchwardens continue in office until the new ones are sworn: and even if the old churchwardens should be re-elected, they must still be re-sworn; yet any act done by them before they were so sworn would, it is presumed, be legal and valid, as being done in their character of old churchwardens, no new ones having been sworn. The duty of the ordinary in this respect is purely ministerial, and he is not to be the judge of the fitness of the person presented to him on the ground of character or conduct; for the churchwarden is the officer of the parish, and his misbehaviour can only prejudice those by whom he has been elected, who are the proper judges of his qualification. Yet no act can be so completely ministerial, as not to leave discretion to refuse to join in an illegal act; so that, if the parish were to return one absolutely disqualified, as a Jew, Papist, child under ten years old, or one convicted of felony, the ordinary would be bound to reject him.[t] And if the archdeacon or other ordinary should refuse to swear them in, a mandamus would be immediately granted to compel him to do so;[u] and the only good return that could be made to such a mandamus would be in a case where the writ states the foundation of the right of the party applying for it; in which case the ordinary might deny the right *as so stated*, as where the writ commanded to swear one *duly elected*, and the return that he was not *duly elected* was held good.[x] But this rule must be observed with great accuracy, for where the writ commanded to swear one *chosen* churchwarden, the return that he was *not duly chosen* was held bad; and, without mentioning the different returns

In this the office of the ordinary is only ministerial.

And on refusal, he will be compelled by mandamus.

[r] Sect. 25. [s] See ante. [t] *Adey* v. *Theobald*, 1 Curteis, ante.
[u] Comyn's Dig. Mandamus, A.; Gibs. 216.
[x] 2 Salk. 433; Str. 1088; 8 Barn. & Cres. 681.

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that may have been made to a mandamus of this kind, it may be stated generally, that all are bad except the one before mentioned, and that the return must not vary from the writ; from which, therefore, it appears that the only question which it concerns the ordinary to inquire is, whether the party who presents himself to be sworn was duly elected, and this would of course include the question as to qualification. And if two sets of churchwardens present themselves to the ordinary, each having a colourable title, it seems that he must swear them both.[y] For a rule nisi having been obtained for a mandamus to an archdeacon and surrogate to swear in certain persons as churchwardens and sidesmen of a parish, it appeared by affidavit that the parties were colourably elected, but that the validity of the election was disputed; that there was an usage in the archdeaconry to swear in the parties elected on a certain day subsequent to the election, appointed annually by the archdeacon; and that the surrogate, being applied to, immediately after the election, to swear in the parties, had said that they must wait till the day appointed, but that he would not disobey a mandamus from this court: held, that this was a refusal, and that the usage, if a good one, should be returned to the mandamus, and the court made the rule absolute, without entering into the question of the validity of the election.[z]

Even if two sets present themselves.

Or the election be disputed.

And so purely ministerial does the act appear to be considered by the Court of Queen's Bench, that it seems they will not contemplate the probability of any valid reason for refusal being given, but will make the rule for a mandamus absolute in the first instance.

And the mandamus will be absolute in the first instance.

An affidavit in support of an application for a mandamus stated that a party had been unanimously elected churchwarden at a regular meeting of the inhabitants of the parish in vestry assembled, and that he afterwards received a notice from the officers of the Ecclesiastical Court of the bishop to attend the archdeacon's visitation to qualify, &c.; that he subsequently attended at the appointed time and place, and presented himself to the archdeacon to take the oath, and, in consequence of an informality, was directed to present himself again on another day; that he did so present himself on that day, when objections were made to him by another person, which he considered untenable, ***but which were not stated in the affidavit,*** in consequence of which, the archdeacon had refused to swear him. Notice had been given to the archdeacon that the court would be

[y] 3 Ad. & Ell. 615.

[z] *R. v. Archdeacon of Middlesex and another*, 3 Ad. & Ell. 615.

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applied to, and the court granted a rule absolute in the first instance.[a]

Another case, in the following year, fully confirms the authority of the decision last mentioned. By the affidavits in support of the application for a mandamus, it was stated that two persons were duly elected, but that the validity of the election was disputed, and other parties claimed to be elected; that, at the instance of the principal official, these two persons presented themselves to be sworn in or make the declaration, and that the official refused to allow them to swear in or qualify.[b] A rule absolute was granted in the first instance.

Duties of churchwardens.

Having now seen in what manner churchwardens may be appointed, we proceed to consider the several duties to be performed by them. Of these, there are some which have been cast upon them by particular statutes, which are altogether foreign to our consideration; and we shall here confine ourselves, generally, to the giving a full outline of such only of their duties as may in any sense be considered ecclesiastical.

These duties may be classed under two heads: and, first, we shall speak of that class which seems to have devolved upon them as the successors of the ancient sidesmen or questmen before spoken of. As such, it is their duty to present whatever is presentable by the ecclesiastical law of the country.[c]

Presentments.

Twice, therefore, in each year, at the visitation of the archdeacon or other ordinary, they must present whatever is amiss or irregular in their parish, either in the conduct of the parson or the parishioners, and this whether they know it of their own knowledge or from common fame.[d]

And should they neglect or refuse to do this, they may be compelled thereunto by the bishop, and proceeded against in the ecclesiastical court, as wilful breakers of their oaths. Formerly it was their duty to present such as did not go to church;[e] and in strictness this part of their duty may still remain, never having been directly repealed or superseded, though it would be inconsistent with the provisions and with the spirit of the *Toleration Act*. It is obvious that such a system of espionage would now be odious and intolerable, and though often available for bad or malicious motives, wholly inadequate to any good or

[a] *Ex parte Winfield*, 3 Ad. & Ell. 614.
[b] *Ex parte Duffield and another*, 3 Ad. & Ell. 617.
[c] Prideaux on Churchwardens.
[d] Canon 115, 118; and see ante, "Visitations by Archdeacons."
[e] Canon 90; 6 Edw. 6, c. 1, s. 2; 1 Eliz. c. 2, s. 14; 3 Jac. 1, c. 1, s. 2.

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useful purpose; and it may safely be numbered with things past and never to be revived.

Must be made before the new churchwardens are sworn.

All presentments made by them must be made before the new churchwardens are sworn, for after that they are fairly out of office, and have no longer any power to make presentments, even as to any thing that may have arisen during their time of holding office; but any right or power of presentment would devolve to the succeeding churchwardens.[f]

Presentable offences.

As to the cases in which they would be bound to present the conduct of the parson, we may give as examples, if he should be irregular in the performance of Divine service, or wilfully alter or omit any part thereof, or introduce things not sanctioned by the Rubric; or refuse or neglect to perform any of his parochial duties, in visiting the sick or administering the sacraments, or other matters of like nature; also, if he should be non-resident, without such license or exemption as is allowed for that purpose, for more than three months, either together or accounted at several times in any one year;[g] or if he should in any manner be guilty of leading an immoral or irregular life.

To keep proper order, &c. at church.

It would seem also to be a branch of this part of their duties, that they are to see that curates are duly licensed and approved of for that office; that no strangers preach in the church, unless they are satisfied that they are in holy orders, and duly licensed to preach by the bishop; that there is no walking about, talking, or irreverence of any kind in the church during the time of divine service;[h] so if any one should sit there with his hat on, a churchwarden would be justified in taking it off, so long as it was done quietly and without disturbance.[i] But, in order that he should be held justified, it would be essential that no unnecessary violence were used. Two parties laid claim to a pew; the one by custom and prescription, the other because it had been assigned to him by the churchwardens; and on a Sunday, when the congregation were assembling, and before the clergyman had entered, the first of these claimants had taken his seat in the pew: the churchwarden desired him to leave it; and on his refusal, laid his hand on him to turn him out, but he rose and walked out. There was contradictory evidence as to the amount of violence actually used, and Rolfe, B., told the jury that the churchwarden had a right to remove the party from the pew in question, provided he used no unnecessary force;

[f] Prideaux; Anderdon on Churchwardens.
[g] 1 & 2 Vict. c. 106.
[h] Canon 18, iii. 28; 2 Keble, 124.
[i] 1 Saund. 1, 14.

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if in the exercise of a fair discretion he thought it more convenient that the pew should be occupied by another party, and if the removal could be effected without any public scandal or the disturbance of divine worship; and he therefore left it only to the jury to say whether any unnecessary violence was used.[k] The jury considered that unnecessary violence had been used, and returned their verdict for the plaintiff, the party ejected from the pew, and who had brought the action against the churchwarden for an assault.

Not to interfere in the ordering the service.

But although churchwardens have thus far power and authority to interfere in preserving order and decorum during the time of divine service, yet in the *administration* of divine service they have no power whatever to interfere. This, as we shall afterwards notice, is more particularly the immediate province of the clergyman, subject to the control of the ordinary. Nor is it possible that the limits of the duties of a churchwarden in this respect can be more clearly and ably defined than in the following words of Sir William Scott,[l] from which it plainly appears that all actual interference, except in cases of overwhelming necessity, which would justify any private person, no less than a churchwarden, is illegal, while to observe and to complain of or present what is amiss in these matters, is the duty of a churchwarden, but a duty requiring discretion in its exercise:

Duties of churchwardens as stated by Lord Stowell.

"I conceive that originally the duties of churchwardens were confined to the care of the ecclesiastical property of the parish, over which they exercise a discretionary power for specific purposes; in all other respects it is an office of *observation and complaint*, but not of *control*, with respect to divine worship; so it is laid down in Ayliffe, in one of the best dissertations on the duties of churchwardens, and in the canons of 1571: in these it is observed, that churchwardens are appointed to provide the furniture of the church, the bread and wine for the holy sacrament, the surplice and the books necessary for the performance of divine worship, and such as are directed by law; but it is the minister who has the use. If, indeed, he errs in this respect, it is just matter of *complaint*, which the churchwardens are obliged to attend to; but the law would not oblige them to complain if they had a power in themselves to redress the abuse.

"In the service the churchwardens have nothing to do but collect the alms at the offertory; and they may refuse the admission of strange preachers into the pulpit, which

[k] *Reynolds* v. *Monkton*, Bridgewater Summer Assizes, 1841, coram Rolfe, B., 2 M. & R. 384.

[l] *Hutchins* v. *Densiloe and another*, 1 Consis. R. 173.

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they are authorized to do by the canon; but when letters of orders are produced their authority ceases.[m] Again, if the minister introduces any irregularity into the service, they have no authority to interfere; but they may *complain* to the ordinary of his conduct. I do not say there may not be cases where they may be bound to interpose: in such cases they may repress and ought to repress all indecent interruptions of the service by others, and are the most proper persons to repress them, and they desert their duty if they do not. And if a case could be imagined in which even a preacher himself was guilty of any act grossly offensive, either from natural infirmity or from disorderly habits, I will not say that the churchwardens and even private persons might not interpose to preserve the decorum of public worship. But that is a case of instant and overbearing necessity that supersedes all ordinary rules. In cases which fall short of such a singular pressure, and can await the remedy of a proper legal complaint, that is the only proper mode to be pursued by a churchwarden, if private and decent application to the minister himself shall have failed in preventing what he deems the repetition of an irregularity. At the same time, it is at his own peril if he makes a public complaint or even a private complaint in an offensive manner of that which is no irregularity at all, and is in truth nothing more than a misinterpretation of his own."

Private persons might interpose in church in cases of urgent necessity, to preserve decorum.

Those ecclesiastical duties which seem to have devolved upon churchwardens as the keepers and guardians of the church and of all things appertaining to it, remain to be considered in the next place, and are, at the present day, more extensive and important than the preceding.

Duties of churchwardens as guardians of the church, &c.

It is their duty, generally, to see that every thing is fit and in proper order for the clergyman duly to perform divine service,—such as a convenient reading desk, &c.; and also what is necessary to enable him to perform all other religious ceremonies enjoined by law, such as the administering the sacrament, &c.; and thus, for such purposes, it is their duty to provide a stone font for baptisms, set up in the proper place; the communion table, a carpet of decent cloth to cover it, and a linen cloth at the time of ministration; also at the time of communion to provide a sufficient quantity of fine white bread and wholesome wine, which must be brought to the communion table in a clear sweet standing pot of pewter, or of some purer metal. It is their duty also to set up the Ten Command-

[m] Not altogether: they should keep an entry of the name, &c. and report the same.

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ments at the east end of the church, and also to provide a parchment book for registering baptisms, marriages and burials, a coffer with three locks and keys to keep it in, of the custody of which we shall speak hereafter:[n] nor does the obligation as to providing these last appear to be superseded by the recent acts providing for a civil register of births, deaths and marriages; and all the things above mentioned are to be provided at the charge of the parish, and under the discretion of the minister or ordinary.[o]

As sequestrators.

It is also a branch of this part of their duty to have the sequestration and care of benefices during a vacancy or suspension. Upon any such avoidance they are to apply to the chancellor of the diocese for the sequestration of the profits thereof; and being thereupon authorized, they are to manage the profits and expenses for the benefit of the successor: they are also to take care that the church is duly served by a curate, and to pay him out of the profits such sum as the ordinary may fix. After the institution of the new minister, they are to account to him. But it should be observed, that although the churchwardens are the proper officers for this purpose, and are bound to perform it if required, yet the ordinary may, if he pleases, confide the trust to others.[p]

As to fabric of the church.

But their principal and most important duty is to take care that the fabric of the church, and all contained therein, whether added for the sake of convenience or by way of ornament or otherwise, is maintained in a good and perfect state, and for that purpose to make all such repairs as may from time to time be necessary.[q] And this being here laid down generally, we must see in what manner it is restricted; for they have no power to deface, demolish or remove any thing in the interior of the church, even though it should give offence to the parishioners;[r] but in every such case the license of the ordinary must be first obtained, who has power to give order for the removal, and which order the churchwardens are justified in executing, for of this matter the ordinary is the sole and proper judge.[s]

As to monuments.

Monuments, however, and every thing of that nature in memory of deceased persons, which have been once set up in the church with the consent of the proper parties, may not be removed by the churchwardens, even though by the consent of the ordinary; for the ordinary would have no

[n] See post, for all things necessary to be provided, Book III. Chap. IV.
[o] See Canons 80—83; Anderdon on Churchwardens.
[p] 28 Hen. 8, c. 11; 3 Burn's E. L. 340.
[q] Canon 85. [r] 2 Cro. 366; Prideaux on Churchwardens.
[s] 12 Co. 105; 3 Inst. 202.

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power to give consent in such a case, and the heir of the deceased would have his action against the churchwarden meddling with them.[t]

Repairing and renewing fabric, utensils, &c.

But in the repairing or renewing any thing relating to the fabric or utensils of the church, the churchwardens need seek no advice nor consent, for they have been expressly invested by the parishioners with authority for this purpose, and have been constituted the sole judges of what is necessary to be done; and they cannot, consequently, be called to account for any part of the parish money which they may have expended in these matters, although laid out improvidently. But any great indiscretion or improvidence might perhaps be proper ground for the removal of churchwardens, the proper mode of effecting which would be by complaint to the ordinary;[u] and as churchwardens may not deface, demolish, or remove any thing already existing in the fabric, or utensils of the church, so neither can they add any thing new thereto without the express consent of the parishioners, and (if it affects the interior of the church) of the ordinary; for, as we have before seen, he is the sole judge of what is fit and decent to be put up in the church; and, if the churchwarden should add any thing without the consent of such parties, it might be taken down, and removed at the pleasure of the ordinary, and the charges for the same be disallowed by the parishioners. Wherever, therefore, the churchwardens contemplate making any such addition as before mentioned, two things are necessary: the consent of the parishioners, and the license of the ordinary, must be obtained. If the license of the ordinary be not obtained, any individual parishioner might allege the same as a good reason for not paying his proportion of the rate made for payment of the expenses of such addition.[x]

Adding to.

What consents are requisite.

Repairs, &c. of additions.

Wherever any such additions have been made, the same are to be considered thenceforth as a part of the church or its utensils, and to be repaired and renewed accordingly at the sole discretion of the churchwardens.

Additions and repairs.

And with regard to what are to be considered as repairs only, and consequently at the discretion of the churchwardens, and what are to be considered as additions requiring the consent of the parishioners, or of the ordinary and parishioners, it is said that, if any necessary things belonging to the church, such as doors, windows, reading

[t] Ibid.; and see "Ornaments of the Church," post, Book III. Ch. IV.; Roll. Abr. 625.

[u] Prideaux.

[x] See Anderdon on Churchwardens; and post, Book III. Ch. IV. and Book IV.

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desks, &c. have perished, or been lost or destroyed, the replacing and restoring them at *any* distance of time are to be considered as repairs; and such necessary things have been well defined to be all things fixed to the freehold, all things ordered to be provided by the canon law, or by statute.[y]

Their duty in arranging seats, &c.

Another part of the duty of churchwardens is to arrange the distribution of seats in the church, and it is one which belongs to them exclusively; for though the opinion of the vestry, and of the incumbent, ought to have great weight with them, yet they are not *bound* to look to either in the discharge of this duty.[z] We have already mentioned the case where an inhabitant was turned out of the pew by a churchwarden, and it will be remembered that in that case Rolfe, B., lays it down, that the churchwarden had a right to remove the man from the pew, provided he used no unnecessary force; if, in the exercise of a fair discretion, he thought it right that the pew should be occupied by another party. But the subject of the distribution of pews will be treated of more particularly hereafter.[a]

As to the bells, belfry and ringers.

The churchwardens have also the custody of the keys of the belfry; and are to take care that the bells are not rung without proper cause; but the minister conjointly with them is to be the judge of the proper cause.[b] They would seem therefore to have a clear right to interfere in the belfry, or in the ordering of ringers. For the custody of the keys implies that the belfry is to be opened or not at their discretion; and it is not the same case as with the body of the church, which is to be opened at stated times for divine service; and if the bells were improperly rung, the churchwardens, according to the canon, would be the responsible parties.[c]

As to churchyard.

The duty of churchwardens also so far extends to the churchyard, as that they are bound to see that it is well and sufficiently repaired, fenced, and maintained in such manner as has been customary; and that it be kept clear from rubbish, thorns, &c. and in fact from any thing that may be an annoyance to the parishioners; and also, that the churchways and stiles and gates are kept in good repair.[d]

[y] Prideaux; and see post, Book III. Ch. IV.
[z] 2 Add. 432.
[a] See "Pews in Churches," Book III. Ch. III.
[b] Canon 88.
[c] Ibid.
[d] Prideaux, 36; 2 Roll. Abr. 217, 265; 1 Curteis, 213; and see "Churchyard."

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Paths in churchyard.

But they cannot alter or vary the paths in the churchyard without the permission of the incumbent, even though it were done with the consent of, and for the benefit of the parishioners; and in a proceeding by the rector of a parish against them for so doing, the defence set up, that it was done for the advantage of the parishioners, was held to be no justification.[e]

Consent of churchwardens to burial of strangers in the churchyard.

It has been said that the consent of the churchwardens must be obtained before a stranger can be buried in their churchyard; and this may be true; yet though the churchwardens are proper parties to object to such burial, it is very doubtful whether they have any absolute right to give permission. For the permission of the incumbent, whose soil is broken, would appear also to be requisite; and although not expressly determined, this appears to have been so understood in the case of the parish of Hendon, decided in 1815.[f] In that parish an agreement had for some time existed between the churchwardens and the incumbent to divide the fees which were paid for the burial of strangers; and the incumbent having prevailed on the sexton to pay the whole of the fees to him, the churchwardens brought their action for a moiety, and it was held that they might recover it.

Remedies by churchwardens.

Having now mentioned the various duties of churchwardens (to many of which, however, it will be necessary to recur under other heads), we come to speak of the remedies which the law enables them to pursue in the proper discharge of their duties. And, first, since they are entrusted with the care of and have a special property in the utensils of every kind belonging to the church, they are to be the prosecutors or plaintiffs against any party who should take away or do any damage to them.[g] In such cases they must act jointly and together, for what one of them does without the other has no force in law.[h] If the damage for which they bring their action were done in their own time of office, then they may allege it *in damnum parochianorum* or *in damnum ipsorum*; but if done in the time of any of their predecessors, or if the action be against their predecessors, they must then allege it *in damnum parochianorum*; and if alleged *in damnum ipsorum*, it would be bad.[i] In such cases the Ecclesiastical Court has no jurisdiction, the remedy is by action at common

[e] 1 Curteis, 260; 3 Phill. 90.
[f] *Littlewood* v. *Williams*, 6 Taunt. 277.
[g] Cro. Eliz. 145, 179; 2 Brownl. 215.
[h] Cro. Jac. 234; Rogers's E. L. 226.
[i] Cro. Eliz. 179; 1 Vent. 89.

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law; and if any of such utensils should be stolen, they must be alleged in the indictment as the property of both churchwardens. In an action brought by churchwardens, it would be sufficient that they were churchwardens *de facto*, that is, admitted and sworn into office, and acting as such, although they might have been improperly elected.[k] We have before seen that churchwardens are *functi officio*, as soon as their successors are sworn; and after that time can commence no action. But if the action had been commenced before their year expired, they might continue it *ex necessitate*.[l]

Cannot be reimbursed what they have expended before rate made.

It is a consequence of the clearly established rule that no rate must be retrospective, that if a churchwarden should expend money out of his own pocket for any of such parochial purposes as before mentioned, he has no legal method of obtaining any reimbursement of the same; and it would make no difference that the alterations or additions on which the money was so expended were made with the consent or by the direction of the ordinary; but whatever money is required for any such purpose, or for the ordinary expenses attendant upon the service of the church, is to be levied by rates duly made beforehand for that purpose. And for this reason, if they neglect either to make or to collect a rate until they are out of office, they are then deprived of all legal power to do either;[m] so that their only safe course is first to have well surveyed and computed the repairs, or whatever other legal purpose they have in contemplation; and, having raised that money by a rate, then, and not before, to give their order for having the repairs, &c. executed.[n] And if a church rate were made for the purpose of reimbursing churchwardens, the payment of it by any parishioner refusing could not be compelled.[o]

Churchwardens are clearly liable to be punished, if they wilfully neglect, or improperly or corruptly discharge their duties.[p] Thus, they are liable to be indicted, if they receive money or other gifts corruptly, during the time they are in office; as where one was indicted for having accepted a silver cup from J. S., for giving him the situation of gallery keeper in the church of which he was the churchwarden, the matter was held clearly indictable.

Remedies against churchwardens.

And it seems that the Ecclesiastical Court has ample authority to punish a churchwarden for any neglect of

[k] 1 H. Black. 559.
[l] 2 Stra. 852.
[m] Prideaux, 106.
[n] 12 East, 558; 2 Ld. Eaym. R. 1012.
[o] 5 Ves. 547; 5 Madd. 4. See "Church Rates."
[p] 1 Sid. 281.

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duty committed to his charge; but it must clearly appear, both that the neglect is wilful, and that the churchwardens have not taken all the clearly legal means in their power; and further, that some actual damage results therefrom. That this last result must follow before the churchwardens could be punishable, appears strongly from a recent case, where a vestry having been called for the purpose of making a rate, one of the churchwardens thought fit to propose as a resolution, "that this vestry, considering church-rates at all times bad in principle, and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject, for which they have been called, until this day twelvemonth." The resolution was carried, and no church rate made; and the churchwarden was, consequently, libelled in the Ecclesiastical Court; upon which occasion Sir H. Jenner observed, "A churchwarden is not punishable for expressing such an opinion, unless the consequence followed that the church fell into a state of dilapidation; this court cannot proceed to punish a churchwarden merely for a vote expressing what he believes to be true. The only question is, whether the church is out of repair in consequence of the resolution, and of the rate being refused. In all cases of criminal proceedings the charge should be fully stated, that by refusal of the rate, and through the neglect or misconduct of the churchwardens, the church is not in a sufficient state of repair."[r]

Criminal proceeding.

In another case of criminal proceeding against churchwardens, it appeared that the archdeacon had ordered the repairs to be undertaken, and had monished the churchwardens to carry the order into effect; that the vestry had resolved that the church should be repaired; that a contract had been entered into for that purpose; that the churchwardens refused to sign the contract; and that the church was still out of repair. But even these allegations were held insufficient to support a criminal proceeding against churchwardens; and it was held that it did not appear sufficiently clear from them that the churchwardens had been guilty of any breach of duty cognizable in the Ecclesiastical Court; for it did not appear but that the refusal to sign the contract might have been proper under the circumstances; and therefore, that as the church was not alleged to be out of repair, in consequence of any wilful neglect by the churchwardens, the special charges of delinquency were in fact no charges at all; that the court would not *infer* wilful disobedience to the order of the

[r] *Cooper* v. *Wickham*, 2 Curt. 310.

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archdeacon; nor would it presume, in the absence of evidence, that the churchwardens had been guilty of any neglect of duty, and that the mere fact of the church being out of repair would certainly not justify the court in punishing the churchwardens."

Difficulties in the conduct of.

It may be inferred from the above cases that a criminal proceeding against churchwardens is one of considerable difficulty, and requiring much care and technical nicety in the conduct of it. There will usually be a succession of acts to be charged as done, or omitted to be done, by churchwardens, before it can be clearly shown that the bad state of repair of the church can be attributed to them exclusively; all these acts must be such as it is a plain breach of their duty to do, or omit to do, and in each of them it seems that wilfulness in such breach of their duty must be both alleged and proved.

Civil proceedings.

But there is another mode of proceeding against churchwardens, which, in practice, would now probably much more often be had recourse to; for, if no fault is attributed to churchwardens personally, but a case arises as to the propriety of repairs, and the churchwardens are willing to do their duty, but obstacles beyond their control intervene, the proper mode of proceeding is in a civil form: as if, to a monition calling upon them to repair the church, they should return that they had called a vestry, and that the vestry refused a rate, they would be exculpated; for they are not only not bound to spend their own money, and incur debt, but it would be illegal in them so to do.[t]

Churchwardens to account.

All churchwardens, at the end of their year, or within a month afterwards at the most, shall, before the minister and parishioners, give up a full account of such money as they have received, and also what particularly they have bestowed in reparation and otherwise for the use of the church; and, last of all, upon going out of their office, they shall truly deliver up to the parishioners whatsoever money, or other things of right belonging to the church or parish, which may remain in their hands, that it may be delivered over by them to the next churchwarden by bill indented.[u]

Remedies if they refuse.

And if upon going out of office, they should refuse to account, they may be presented at the next visitation by the new churchwardens,—or, indeed, any inhabitant of the parish may call them to account before the ordinary; or

[t] For these, and several other questions, arising out of the duties of churchwardens in respect of repairs and rates, we must refer to the chapter on Church Rates.

[u] Canon 89.

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their successors may have an action against them for the church goods, or for any damage done to the parish contrary to their trust.[x] The delivery of this account may be compelled by the spiritual court; but such a remedy is wholly inadequate; for it has been held that that court has no authority to examine into the propriety of the charges; so that any illusory account which might be given in, would seem to be an answer to, and put a stop to such a proceeding; for if any further steps were taken in that court, after an account had been delivered, a prohibition would be granted.[y] Neither have justices of the peace any jurisdiction over churchwardens in respect of church accounts;[z] but churchwardens are bound to allow an inspection of their accounts; and upon the party stating some special reason for which he wishes to see the accounts, a mandamus to compel them to allow such inspection will be granted. Nor will it be any sufficient answer to such on application to the court, that a penalty is imposed by statute 17 Geo. II. c. 38, for improperly refusing such inspection.[a]

May account to select persons by custom.

If the custom of the parish is for a certain number of persons to have the government thereof, and the account is given to them, the custom is good, and the account so given is a good account.[b]

Allowing the accounts.

If the account thus rendered is allowed by the parishioners, or the major part of them, in vestry assembled, it is to be entered in the church book of accounts, which every parish is to have for that purpose; and those who allow the account are there to set their hands to it, in proof of their assent to the same, and the balance to be handed over as already mentioned.

Proving items of account.

With respect to the items of the account, the oath of churchwardens is generally taken as sufficient to prove the payment of all sums under forty shillings, unless they are disputed by the parishioners, or suspicions are entertained of the fairness of such items. It is however best and most satisfactory for all parties, that vouchers of all disbursements should if possible be produced. With respect to the payment of all larger sums than forty shillings, receipts or vouchers are always required to be produced, and can in no case be dispensed with;[c] and if required, it is necessary that these payments should also be proved by witnesses present at the making thereof, who shall subscribe their names to the vouchers and receipts

[x] Prideaux's Churchwardens.
[y] *Leman* v. *Goulty*, 3 T. R. 3.
[z] 1 Keble, 574.
[a] *R.* v. *Clear*, 4 Barn. & Cres. 899.
[b] 1 Burn's Justice, 644; Gibs. 242.
[c] Prideaux, 93.

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for the authenticity of the same; and in default thereof, these accounts will not be allowed to pass as binding on the parishioners. And when they have thus accounted to the satisfaction of the parishioners, and the account has been thus allowed, they are *functi officio*, and it shall not afterwards be in the power, either of the parishioners or of the spiritual court, to make them account again, unless some fraud in their accounts be afterwards discovered.[d]

But if the ordinary has any reason to be dissatisfied with the accounts of churchwardens respecting the church goods, he may, although the same have been allowed in vestry, call the churchwardens before him, and make them produce a further account concerning them; and if it should then appear that they have disposed of any of the goods or utensils of the church, with the consent of the parishioners, but without his consent, in order to defray in part or in the whole the necessary church rates or other parochial rates or expenses, which must otherwise have been defrayed by the parishioners out of their own pockets, he may compel the said churchwardens to replace the same at their own expense, or otherwise inflict such punishment as he shall deem expedient.[e] And the reason of this is obvious; for were it otherwise, the parishioners might all combine to defraud the church of all her costly ornaments, plate, &c. in order to relieve themselves from the payment of parish rates, or even for their own private and fraudulent emolument.

It will be observed from what has been said on this subject of accounts, that some further remedy than those mentioned in our books on these subjects appears necessary, in order to obtain a satisfactory account from churchwardens. It does not appear at present that any case has occurred, in which they have been compelled to account by bill in Chancery, filed against them for that purpose; but as they are trustees of the funds placed in their hands for the parish, there appears to be no reason why they might not, like all other trustees, be called to account in this manner by the proper parties.

Office may determine before year is ended.

The office of a churchwarden may determine before the end of his year of service; for if he ceases to inhabit the parish, his place must be supplied by a new election.[f] And it is said to have been decided more than two centuries ago, that the parishioners may displace their churchwardens, though chosen for a time certain, before the expiration of that time. And as to the mode by which they

[d] Gibs. 194; Wood's Ins. book i. ch. vii.; Bun. 259.
[e] Prid. 94; 2 Roll. R. 71.
[f] 1 Hagg. Cons. 383.

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may be displaced, Gibson says, that if the churchwardens misconduct themselves, the parishioners have a remedy by complaint to the ordinary in order to their removal.[g]

Section 3.

Of Parish Clerks.

Origin of the office.

For our knowledge of the origin of the office of parish clerk, we are principally indebted to a constitution of Archbishop Boniface, which declares that the benefices of holy water were from the beginning instituted from charity, that poor clerks in the schools might be maintained with the profits thereof, until they were by improvement qualified for something greater.[h]

Those who had these benefices of holy water were called *aquæ bajuli*, and were assistants to the minister in carrying the holy water; and it is doubtful whether the office of parish clerk may ever originally have existed independently of that of the *aquæ bajulus;* but it is probable that such an office did exist in some parishes, though by no means universally; such parish clerks being in holy orders and assistants to the minister. And that after the constitution of Archbishop Boniface, which directed that the office of *aquæ bajulus* should be bestowed on a real clerk, the assistant of the minister, in parishes where such existed, was the person on whom it was usually conferred, until the two offices in time became united, and then the *aquæ bajulus*, in parishes where there had been no assistant clerk, performed such duties as were performed in other parishes where the offices of *aquæ bajulus* and assistant clerk had been united.

And in the above-mentioned constitution, it is declared that the rectors and vicars, who are more concerned to know who are fittest for such benefices, do endeavour to place such clerks in the aforesaid offices, who, according to their judgment, are skilled and able to serve them agreeably in the divine administration, and *who will be obedient to their commands.*[i] But it appears that the occasion of making this constitution was, that disputes had arisen between rectors and vicars of churches and their parishioners about conferring the said benefices; and as the constitution could not prevail against the custom, if such existed, it has rather had the contrary effect from what was intended by it; for it has been quoted against

[g] See *Dawes* v. *Williams*, 2 Add. 130.
[h] Johns. Constitutions of Boniface, 1261.
[i] Ibid.

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the canon next mentioned, as evidence to prove that the power of the minister to appoint the clerk had been contested at a much earlier period.

Right of electing or nominating.

By the 91st canon it is ordained, that no parish clerk, upon any vacation, shall be chosen in the city of London or elsewhere, but by the parson or vicar; or where there is no parson or vicar, by the minister of that place for the time being, which choice shall be signified by the said minister, vicar or parson to the parishioners, the next Sunday following, in the time of divine service. But as the canon could not prevail against a custom, the right of nominating the parish clerk still continued to be a matter of frequent contest between the minister and the parishioners; and we now may consider that the matter rests on precisely the same grounds as we have already seen in the case of election of churchwardens, namely, that where no custom can be clarly proved to the contrary, the nomination shall be according to the canon; but that if a custom can be clearly established, the canon shall not prevail against it, for no canon can repeal or alter a custom.

In new churches or chapels.

As to all churches or chapels built, acquired or appropriated under the earlier church building acts, it is expressly enacted, that every clerk shall be annually appointed by the minister of such church or chapel, but in the later acts no such enactment is to be found; in these churches or chapels therefore, since there can be no custom, the appointment of the clerk would be according to the canon.

Qualification.

The same canon directs that the clerk shall be of the age of twenty-one at the least; known to the parson, vicar or minister to be of honest conversation, and sufficient for his reading, writing, and also for his competent skill in singing, if it may be. And where the appointment of the clerk is with the minister, who may be supposed to derive his right from the canon, he would be bound by it, so that he could not appoint a clerk under the age of twenty-one; but where the appointment is with the parishioners, as they exercise the right independently of, or rather in defiance of the canon, there does not appear to be anything to prevent them, if they please, from choosing a clerk under the age of twenty-one; for although parish clerks, after being chosen, were formerly licensed by the ordinary, who might thus perhaps have had some check upon an appointment inconsistent with the canon, yet it was subsequently settled that such license was unnecessary;[1] and except in those cases under the recent act, to be presently

License not always necessary.

[1] *Peak* v. *Bourne*, Str. 942; 2 Roll. Abr. 286.

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mentioned, where the clerk is a person in holy orders, no mandamus would probably be granted to the ordinary to swear or license a parish clerk.

Clergymen may be appointed to the office and required to act as curates.

From and after the 29th day of July, 1844, whenever any vacancy shall occur in the office of church clerk, chapel clerk, or parish clerk, in any district, parish or place, it shall be lawful for the rector or other incumbent, or other the person or persons entitled for the time being to appoint or elect such clerk, if he shall think fit, to appoint or elect a person in the holy orders of deacon or priest of the United Church of England and Ireland to fill the said office; and such person so appointed or elected as aforesaid shall, when duly licensed as after provided, be entitled to all the profits and emoluments of such office, and shall also be liable in respect thereof, so long as he shall hold the same, to perform all such spiritual and ecclesiastical duties within such district, parish or place as the said rector or other incumbent, with the sanction of the bishop of the diocese, may from time to time require;[k] and this, it will be seen, is a return to the ancient practice, and agrees with the directions of the constitution of Archbishop Boniface.

License in all such cases necessary.

And every such appointment or election of a person in holy orders, if made by any other person or persons than by the rector or other incumbent of such district, parish or place, shall be subject to the consent and approval of such rector or other incumbent of such district, parish or place; and no person in holy orders, so appointed or elected as aforesaid, shall be competent to perform any of the duties of his office, or any other spiritual or ecclesiastical duties within such district, parish or place, or to receive or take any of the profits or emoluments of his said office, unless and until he shall have duly obtained from the bishop of the diocese within which such district, parish or place is situate, such license and authority in that behalf as are required and usual in respect of stipendiary curates; but, nevertheless, such license and authority, when so obtained, shall entitle the person so obtaining it to hold the said office, and to receive and take the profits and emoluments thereof, until he shall have resigned the same, or have been suspended or removed, without any annual or other re-appointment or re-election thereto.[l]

Incumbents are not to be thereby exempted from providing other curates, &c.

But no rector or other incumbent in a parish, &c. where any person in holy orders shall have been appointed or elected to fill the office of clerk, shall, by reason of any such provisions, be exempt from any duty or obligation of employing within the same district, parish or place any

[k] 7 & 8 Vict. c. 59, s. 1. [l] Sect. 3.

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curate or other assistant to which by any law or usage he is or may be already liable; but it shall be lawful for the bishop of the diocese from time to time to require every such rector or other incumbent to provide, or for the said bishop to nominate and license, such other curates and assistants to officiate within every such district, parish or place, in addition either to the person or persons so intended to be employed as aforesaid, or to such lecturer or preacher, or to such church clerk, chapel clerk or parish clerk, and to make regulations for the payment of the stipends of such other curates and assistants, as fully and in the same manner and subject to the same restrictions as he might have done before.[m]

When parish clerk has a freehold in his office.

A parish clerk, not being a person in holy orders, has a freehold in his office,[n] and this whether appointed by deed or only by parol, for a parol appointment has been held sufficient to confer this office upon him;[o] but where a person in holy orders has been appointed under the recent statute, he shall not, by reason of his appointment, acquire any freehold or absolute right to or interest in such office, or to the profits and emoluments thereof.[p]

Removal of and deprivation.

The principal difficulty in the law as regards parish clerks has arisen, not as to the manner of their election or nomination, since that appears to be very clearly defined as above stated, but as to the nature of that office, and consequently as to the power of depriving them of it, and by whom and in what manner it may be done. Although this appears now to be sufficiently settled and defined by a statute made principally for that purpose, yet as that statute is so recent that no case can at present have occurred under it, it will be better to mention the state of the law as it existed prior to the month of July, 1844.

Former decision on this point.

The general effect of several decisions on this subject was, that the minister had full right to remove his clerk from his office *upon sufficient grounds*, but that he could not remove him arbitrarily; and further, that although there might exist sufficient grounds, yet that he was not therefore to be removed in the first instance, and without being summoned to answer the charges and accusations made against him; and that if the parish clerk should be removed without these preliminaries, then that a mandamus would be granted to restore him to his office. Thus, in an early case before Lord Kenyon, a minister was directed by mandamus to restore the parish clerk whom he had removed; and, in his return to the mandamus, the

[m] Sect. 4.
[n] 2 Roll. Abr. 234.
[o] Salk. 536.
[p] 7 & 8 Vict. c. 59, s. 2.

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minister set out what it was admitted would be sufficient ground for the removal, but it did not show that the clerk had ever been summoned to answer the charge before he was removed. Lord Kenyon therefore says: "If we hold this return to be sufficient we should decide contrary to one of the first principles of justice, *audi alteram partem*. It is to be found at the head of our criminal law that every party is to have a right of being heard before he is condemned, and I should tremble at the consequence of giving up this principle. I have no doubt that the minister has acted on the best motives, and notwithstanding our decision he will be perfectly justified in renewing his accusation against this person, and in removing him from his office in a more formal manner."[q]

Other cases were subsequently decided upon exactly the same principle;[r] and the return to the mandamus was always insufficient, however gross the alleged misconduct of the clerk, unless it appeared that an opportunity had been offered for his defence.

This principle, which in itself appears so just and reasonable, was in a very recent case carried out to an extent of which the wisdom does not seem so obvious, and which was probably the immediate occasion of the provisions of the new statute.

The return made by the minister to a mandamus, ordering him to restore the parish clerk whom he had deprived, set out several cases of gross misconduct committed in the church *in the presence and hearing of the minister himself*; for which cause the minister stated that he had deprived him of his office in due course of law. To this return the objection was made, that it did not show that the clerk had ever been summoned to explain or answer the charges. For the vicar, it was contended, that he had a right to remove on the view of the clerk's conduct, and that any further evidence on such a matter must be altogether superfluous. But Lord Denman held that it was important that the general rule laid down in *Rex* v. *Gaskin* should be adhered to even in this case. "We do not think," he says, "the application of this rule is excluded, because the charge rests on the minister's personal observation, inasmuch as that is not inconsistent with the disproof of criminal motives and intentions, and with the mitigation to which other facts might possibly entitle the accused. This principle appears to us valuable to the judge, whom it tends to secure against dealing too hastily from his own first impression; and we think it indispen-

[q] *R.* v. *Gaskin, D. D.*, 8 T. R. 209. [r] See *R.* v. *Davies*, 9 D. & R. 234.

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sable in all cases for the due administration of every judicial power.[3]

Present state of the law.

But now, any person in holy orders who may have been appointed or elected parish clerk, shall be at all times liable to be suspended or removed from his office, in the same manner, and by the same authority, and for such or the like causes, as those whereby any stipendiary curate may be lawfully suspended or removed; and an appeal to the Archbishop of Canterbury is given, as in the case of a stipendiary curate.[4]

Clerks in holy orders.

Clerks not in holy orders.

And with respect to parish clerks who are not in holy orders, it is now provided, that if at any time it shall appear, upon complaint or otherwise to any archdeacon or other ordinary, that any person not in holy orders, holding or exercising the office of church clerk, chapel clerk or parish clerk, in any district, parish or place within and subject to his jurisdiction, has been guilty of any wilful neglect of, or misbehaviour in his said office, or that by reason of any misconduct he is an unfit and improper person to hold or exercise the same, it shall be lawful for such archdeacon or other ordinary forthwith to summon such church clerk, chapel clerk or parish clerk to appear before him, and also by writing under his hand, or by such process as is commonly used in any of the courts ecclesiastical for procuring the attendance of witnesses, to call before him all such persons as may be competent to give evidence or information respecting any of the matters imputed to or charged against such clerk; and such archdeacon or other ordinary may, if he see fit, examine upon oath, to be by him administered in that behalf, any of the persons so attending before him, respecting any of such matters; and may thereupon summarily hear and determine the truth of the matters so imputed to or charged against such clerk; and if, upon such investigation, it shall appear to the satisfaction of such archdeacon or other ordinary, that the matters so imputed to or charged against such clerk are true, it shall be lawful for the said archdeacon or other ordinary forthwith to suspend or remove him from his office; and by certificate under his hand and seal, directed to the rector or other officiating minister of the parish, district or place wherein such clerk held or exercised his office, to declare the office vacant; and a copy of such certificate shall thereupon by such rector or other officiating minister be affixed to the principal door of the church or chapel in which such clerk

[3] *Reg.* v. *Smith*, Queen's Bench, Hil. T. 1844.
[4] 7 & 8 Vict. c. 59, stat. 2; and see ante, Stipendiary Curates.

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usually exercised his office; and the person or persons who, upon the vacancy of such office, are entitled to elect or appoint, may forthwith proceed to elect or appoint some other person to fill the same.[u]

Power to remove clerk so deprived from premises held in right of his office.

And in case any person, having ceased to be employed in such office, or having been duly suspended or removed therefrom, shall at any time refuse or neglect to give up the possession of any house, building, land or premises, or any part or parcel thereof, by him held or occupied by virtue or in respect of such office, it shall be lawful for the bishop of the diocese, upon complaint thereof to him made, to summon such person forthwith personally to appear before him, and to show cause for such refusal or neglect; and upon the failure of the person so summoned to obey such summons, or, upon his appearance, to show to the said bishop such cause as may be deemed by the said bishop sufficient for such refusal or neglect, the said bishop shall thereupon grant a certificate of the facts aforesaid under his hand and seal, to the person or persons entitled to the possession of such house, building, land or premises, who may thereupon go before any neighbouring justice of the peace, and such justice, upon production of such certificate and proof of such wrongful retention of possession, shall, and he is by the act required to issue his warrant, under his hand and seal, directed to the constables or other peace officers of the district, parish or place within which such house, building, land or premises is or are situate, or to the constables or other peace officers of any neighbouring district, parish or place, requiring them forthwith to expel and remove from the said house, building, land or premises, and from every part and parcel thereof, the person so wrongully retaining possession thereof, and to deliver the peaceable possession thereof to the person or persons so entitled to the same; and such constables or other peace officers are required promptly and effectually to obey and execute such warrant, and thereupon it shall be lawful for them also to levy upon the goods and chattels of the person so by them expelled and removed, the necessary costs and expenses of executing such warrant, the amount whereof, in case the same shall be disputed, shall be forthwith settled and determined by the said justice of the peace by whom the said warrant was so issued, or by any other justice of the peace residing in or near the said district, parish or place, whose decision thereupon shall be final, and who is authorised to make such order in that behalf as to him shall seem reasonable.[x]

Jurisdiction of justices.

[u] Sect. 5. [x] Sect. 6.

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Deputy clerk.

A parish clerk may appoint a deputy to discharge the duties of the office for him;[y] and if such deputy clerk had been removed, no *mandamus* would have been granted to restore him:[z] it was consequently frequently found useful for clergymen to appoint some friend to be their parish clerk, who then immediately appointed a deputy, and the trouble and difficulty of a formal process in order to remove a parish clerk were thus got rid of: nor does it appear that the law in this respect is in any manner altered by the recent statute; for there is no law which declares that the person to be appointed the parish clerk shall be a person residing in the parish, but only that he shall be known to the minister to be of honest conversation, and sufficient for his reading, &c. The process, therefore, which the recent statute prescribes and renders necessary for the removal of a parish clerk, may, as it seems, be evaded by any minister who prefers that his clerk should in fact be always a deputy.

The exercise of the office of parish clerk by a sufficient deputy, who shall faithfully perform the office and properly demean himself, is by the recent statute declared not to be a wilful neglect of his office on the part of the parish clerk, so as to render him liable for such cause alone to be suspended or removed therefrom.[a]

Fees to clerk.

It is directed by the canon already mentioned that the clerk shall have and receive his accustomed wages either at the hands of the churchwardens or by his own collection, according to the custom of the parish; and this therefore being according to custom, the spiritual court is not the proper place for the clerk to bring any suit for his fees. He must consequently bring his action in the common law courts either against the churchwardens, if the custom be that he should be paid by them, or against any parishioner who refuses to pay him, if it be the custom for them to pay. As for the fee itself and its amount, it seems to depend entirely upon custom; and although it has been said that where no fee is due by custom, the clerk might maintain action for *quantum meruit*, or proceed by suit in equity,[b] it would appear very doubtful how far he could succeed in recovering any thing by either of those remedies.

The church-building commissioners are empowered, with consent of the vestry, to fix the clerk's fees in any parish, and, with the consent of the bishop, to fix his fees in district or parochial chapelries; and it is directed that the

[y] Strange, 942.
[z] Lofft, 434.
[a] 7 & 8 Vict. c. 59, s. 5.
[b] Stra. 1108; Rogers's E. L. 642.

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fees so fixed may be recoverable in such manner as ancient legal fees may be recovered:[c] and it is also by the same act directed that salaries to the minister and clerk may be assigned out of the pew rents. The commissioners may also in certain cases make special arrangements as to the proportions of fees to be assigned to the clerk of the new parish and of the old parish respectively. But there is little to be said on this subject generally, for the commissioners have an extensive discretionary power in the matter, and the arrangement in each particular parish may be different. But however different the fees may be in amount, they would be recoverable in the same manner as above mentioned.

Section 4.

Sextons, &c.

Dr. Burn says, "the sexton, segsten, segerstane, sacrista, the keeper of the holy things belonging to the divine worship, seemeth to be the same with the ostiarius in the Romish Church;" originally the door-keeper or porter, which seems indeed to approach near to this office at present.

Nature of the office.

The nature of the office appears to depend entirely upon the custom of the particular parish. In some, and indeed in the greater number of parishes, the sexton is nominated by the parson, and so it has been said to be in all cases by the general law, and in the absence of any custom to the contrary; but in some other parishes he may be chosen by custom by the parishioners. And again, in some parishes the sexton may be elected for life, and may consequently have a freehold in his office, while in others he may be elected only during pleasure.[d]

When he cannot be deprived.

In parishes in which by custom the appointment of sexton is for life, he becomes entitled to all those privileges which are incident to a freehold office; so that in such case, although he might be punished by ecclesiastical censures, he could not be deprived of his office by such means.[e]

Mandamus to restore or admit.

Since, however, it is doubtful whether the office be a freehold or not, it seems that the Court of Queen's Bench would not issue a *mandamus* to restore to the office, unless the application were accompanied by a certificate to show that in the parish in question he was chosen for life; for

[c] 59 Geo. 3, c. 134, s. 11.

[d] See *Rex* v. *Stoke Damerel*, 5 Ad. & Ell. 584; *Nightingale* v. *Marshall*, 2 Barn. & Cress. 313.

[e] 2 Roll. Rep. 234.

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a return to a *mandamus* that the sexton in the parish in question was not chosen for life, but that he might be removed at pleasure, would be good:[f] if, however, the application were for a *mandamus* to admit to the office one who had been nominated or elected, it does not appear that such a certificate would be necessary, for the same reason would not apply.

Where a mandamus is granted, either to restore or to admit, it would be directed, as it seems, to the churchwardens, if the election were with the parishioners; to the parson, if the nomination was with him.[g]

The right to elect or nominate a sexton being in dispute between the parishioner and the rector in a parish, the rector, or the curate at his request, nominated one to the office. The parishioners thereupon required the churchwardens to call a vestry for the purpose of electing another party to the office; and upon their refusal, applied for a mandamus to compel them to call a vestry for this purpose. It was objected that the office was full, and therefore that a mandamus would not be the proper course, and Lord Denman observed, that such an objection would generally be valid, unless the office were full by an appointment clearly made without any authority whatever. In this case, however, there were affidavits filed on both sides, which made it appear at least a very doubtful question with which party the right to nominate or elect really rested. This, therefore, connected with the observation of Lord Denman, would appear to have been a sufficient answer to the application, inasmuch as the office having been filled by the rector, nobody had in any way proved that the right of appointment was in any one else. But the ground upon which the application was actually refused, and as to which all the judges of the court were unanimous, was, that there existed another remedy for the parishioners who felt themselves aggrieved, for that they might dispute the right to the office by refusing to pay the fees, or by bringing an action against the sexton who should take them. Patteson, J., observed, that he had no doubt but that if the court was satisfied that the first appointment was void, they could grant a mandamus for a new election; and in this case the court seems to have been much influenced by the fact, that the appointment had been made by the party, who, *primâ facie*, and according to the general law, would have the right to appoint.[h]

Right to the office may be tried by a refusal to pay fees.

[f] 1 Cowp. 413; Str. 115.
[g] See *R.* v. *Stoke Damerel*, ante.
[h] *R.* v. *Stoke Damerel*, ante.

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In the course of the argument on the above case, Lord Denman inquired whether this was an office for which a *quo warranto* would lie. The answer given in the argument would decidedly imply that it is not; Coleridge, J., also seemed to assume in his judgment that it could not; and the same learned judge, in a note to Blackstone's Commentaries, on the subject of the writ of *quo warranto*, says, it is perhaps speaking too generally to say that a writ of *quo warranto* lies for the usurpation of any office: as it was instituted only to protect the rights and prerogatives of the crown, it is limited to usurpations which trench on them; and accordingly the information which has grown up in the place of it can only be filed in such cases. In the cases of the *King* v. *Daubeny*[i] and of the *King* v. *Shepperd* and others,[k] the court refused leave to file informations in the nature of *quo warranto*, for the alleged usurpation of the office of churchwarden on this ground.[l]

Women may be chosen.

It has been decided that a woman may be chosen for and exercise the office of sextoness, and also that women can vote in the election of one. The reason which appears to have been given by the court in arriving at that decision is not very complimentary to the sex, for upon its being shown that women could not vote for members of parliament, coroners, &c., the court said that as this was an office which did not concern the public, or the care or inspection of the morals of the parishioners, there was no reason to exclude women who paid rates from voting.[m] It does not however appear that the law would be so universally, for the election would ordinarily be by the vestry, and it would not probably have been the custom for women to vote, in which case there can be little doubt that such a custom would be supported as reasonable.

In new districts.

The office of sexton has not been overlooked in some of the new Church Building Acts. Thus it is enacted by the 59 Geo. III. c. 134, that when any parish shall be divided or district created, all fees, dues, profits and emoluments belonging to the parish clerk or sexton respectively of any such parish which shall thereafter arise in any district or division of any parish, shall belong to and be recoverable by the clerks and sextons to whom they shall be assigned, in like manner and after the same rate, in case of the division of a parish, as they were recoverable by the clerk or sexton respectively of the original parish;

[i] 2 Str. 1196.
[l] 3 Black. Comm. 262, Coleridge's ed.
[k] 4 T. R. 381.
[m] Str. 1114.

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and the commissioners may make compensation for any loss of fees or emoluments which any clerk or sexton may sustain by reason of such division. But as we have already observed, in speaking of the fees to be claimed by the parish clerk in such cases, there will be a considerable difference in the different parishes and districts. The only uniformity being in the mode by which the fees may be recovered. And this, in the case of the sexton, would be by action at common law, as in the case of the clerk.

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BOOK II.

OF THE PROPERTY OF PERSONS ECCLESIASTICAL, AND OF THE PROVISION RECOGNISED BY LAW FOR THEIR SUPPORT.

CHAPTER I.

LANDS OF ECCLESIASTICAL CORPORATIONS.

SECTION 1.

Rights and Restrictions of Ecclesiastical Corporations in respect of their Lands.—Waste.

Provisions for maintenance of the clergy.

HAVING spoken of the various ranks and dignities of persons ecclesiastical, we come now to speak of the provision recognised by the laws of this country for their decent maintenance and support. The manner in which this is given, and the sources from which it is derived, are various, especially since new sources of income, formerly unknown to the law, have been introduced by recent statutes. Of these various provisions we now proceed to speak in their order,—a subject very extensive in its nature, and which will necessarily embrace a great variety of important collateral points. The first of these sources of revenue is that derived immediately from lands expressly given to some particular ecclesiastical persons for their support.

Lands of ecclesiastical corporations.

These lands they hold, in each instance, as a corporation; for every ecclesiastical person to whom lands are given, or on whom they devolve, is either a corporation sole, or a member of a corporation aggregate, for the purpose of holding such lands; for it has been found necessary, when it is for the advantage of the public to have particular rights kept up and continued, to constitute artificial persons, who may maintain a perpetual succession and enjoy a kind of legal immortality; and these artificial persons are corporations aggregate or sole; aggregate, as the dean and chapter of a cathedral or collegiate church;

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sole, as a bishop, a dean distinct from his chapter, each individual member of that chapter, a parson or a vicar; all of whom, in their artificial character, have legal capacities and advantages, especially in the holding of lands, which in their natural persons they could not have had; and the necessity, or at least use, of this institution, will be very apparent if we consider the case of a parson of a church. At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage-house, the glebe and the tithes of the parish, were vested in the then parson, by the bounty of the donor, as a temporal recompence to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompence for the same care. But how was this to be effected? The freehold was vested in the parson; and if we suppose it vested in him in his natural capacity, on his death it might descend to his heir, and would be liable to his debts and incumbrances, or at best the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law, therefore, has wisely ordained that the parson, *quatenus* parson, shall never die, any more than the king, by making him and his successors a corporation; by which means all the original rights of the parsonage are preserved entire to the successor; for the present incumbent and his predecessor, who lived seven centuries ago, are in law one and the same person, and what was given to the one was given to the other also.[a]

And what is here said by Blackstone, as to lands given to a parson, is equally applicable to the case of all lands given to any ecclesiastical corporation, whether sole or aggregate.

Ecclesiastical corporations by common law.

In this country the king's consent is absolutely necessary to the erection of any corporation, but such consent may be impliedly given; and it is to be implied in the case of corporations which exist by force of the common law, to which our former kings are supposed to have given their concurrence; common law being nothing else than custom arising from the universal agreement of the whole community. Of this sort are all bishops, parsons, vicars (and, for this purpose of holding lands, churchwardens), who by common law have ever been held, so far as our books can show us, to have been corporations *virtute officii;* and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete

[a] 1 Black. Com. 470.

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legal idea of any of these persons, but we must also have an idea of a corporation capable to transmit his rights to his successors at the same time.[b]

Right of ecclesiastical corporations in their property.

All lands, therefore, which are held by ecclesiastical persons *eo jure*, are held by them in their corporate capacity; and from this circumstance it is that there have not been wanting those who, regarding the whole body of ecclesiastics as forming one great corporation, consider all lands, which may be vested in any particular member or members of it, as not being wrongfully diverted if applied to the use of some other member or members. Nothing can be more fallacious than such a proposition. The ecclesiastical body is wanting in every legal requisite of a corporation; and the lands which are held by its different members were probably never given by the grantors, or intended to be given for any common purpose. Those who, from some local connection, or for the benefit of their own lands in the neighbourhood, richly endowed a particular ecclesiastical corporation there situate, could no more have contemplated the benefit of some distant village or district not then in existence, than he who gives his property to his heirs would contemplate its diversion to another family, if a family should be found more needy than his own. Every ecclesiastical corporation, whether aggregate or sole, holds his or their lands as distinct and independent of every other as the corporation of Bath holds its property independently of that of London. The university of Oxford is in itself a corporation, established for the purposes of education, while each college in that university is also a corporation for the same purposes. With far greater force, therefore, might it be said that the revenues of one college might be properly diverted to the aid of another, so long as those revenues were employed for the general purposes of education.

Legally, however, the only guide to the proper employment of the funds of a corporation is the will and intention of its founder, an intention either expressed directly, or to be implied from the fact, that the funds have from time immemorial been employed for one uniform purpose, nor is it easy to foresee the extent of difficulties and dangers which might ensue from the departure from a rule at once so simple, just and obvious.[c]

Although, therefore, a considerable part of the revenue for the support of members of the ecclesiastical body is derived immediately from land, there is no such thing as

[b] 1 Black. Com. 472. [c] But see ante, Ecclesiastical Commission.

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church land properly so called. But all lands of this nature are the property of some particular corporation; and consequently they are, in many respects, subject to the same laws as affect the land of other corporations, whether lay or ecclesiastical; and, for the consideration of our present purpose, it will not be necessary to make any distinction between the lands of those whom we have mentioned as corporations sole, or those of corporations aggregate.

Bishops, rectors, parsons, vicars, and other ecclesiastical persons, while they have, in their corporate capacity, the fullest possible right in their lands to themselves and their successors, are yet, in their individual capacity, considered, in most respects, as tenants for life of those lands, which they hold *jure ecclesiæ*.[d] Archbishops and bishops were formerly considered as tenants in fee simple of the lands which they held in such right. And in the case of *Jefferson* v. *The Bishop of Durham*, Rooke, J., observes, "I consider the bishop as having, to certain purposes, a fee simple in his bishopric; but he is seised, to a certain extent, as a public officer, for public trusts." As to rectors, parsons and vicars, Lord Coke says, that for the benefit of themselves and their successors, they were in some cases esteemed in law to have a fee simple qualified. But, if anything was to be done to the prejudice of their successors, the law esteemed them to have, in effect, but an estate for life: and since the several statutes hereafter to be mentioned, by which all ecclesiastical corporations are restrained from alienation, they are generally considered as *quasi* tenants for life only.[e] Consequently, like all tenants for life, they are prohibited from destroying those things which are not included in the temporary profits of the land, because that would tend to the lasting loss of their successors. Such destruction is called waste, which all ecclesiastical corporations are disabled from committing.[f] If, therefore, they cut down trees upon their lands, except for reparation, they are punishable in the ecclesiastical courts, and may also be prevented from so doing, as hereafter mentioned.

Ecclesiastical persons are *quasi* tenants for life.

Waste.

Punishable.

By the statute 35 Edw. I., which we shall notice more particularly hereafter, it is declared, that parsons shall not presume to fell trees growing in the churchyard, but when the chancel or body of the church requires reparation. And Lord Coke has cited a case, where, upon complaint

Whether prohibition would be granted.

[d] Vin. Abr.
[e] 1 Inst. 44 a; ibid. 341 a and b; Cruise, Dig. tit. 3, ch. i.; Litt. 648.
[f] Vin. Abr. tit. Dilapidations.

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to the king in parliament, that the Bishop of Durham had committed waste by destroying timber, a prohibition had issued against him. In another case he is reported to have said, that if a bishop cut down and sold trees, and did not employ them for reparation, and any one would move it, he would grant a prohibition out of the King's Bench.[g]

The authority of this dictum has been doubted in a modern case, in which the Court of Common Pleas held that it had no power to issue an original writ of prohibition, to restrain a bishop from committing waste in the possessions of his see, at least at the suit of an uninterested person, and doubted whether even the Court of King's Bench had such a power.[h]

It must not however be supposed that, because the above dictum of Lord Coke has been doubted, such waste could be committed with impunity. For, as in many other cases, where the powers of the common law are insufficient, the courts of equity afford a reasonable remedy; and the Court of Chancery has long exercised this kind of jurisdiction, and interfered to prevent waste by ecclesiastical corporations; for there is a case[i] in which Lord Keeper Coventry granted a prohibition at the suit of a patron against a prebendary, for having wasted the trees of his prebend, and this doctrine is now fully established.

Court of Chancery would restrain by injunction.

The Spiritual Court would still doubtless punish a party who should be guilty of committing waste in the lands of an ecclesiastical corporation, of which, for the time being, he was tenant for life; but this would be a very inadequate remedy for the patron or persons thereby injured. The fittest mode of proceeding therefore would be, for any party who would be thereby injured, to apply to the Court of Chancery for an injunction. And where the patronage of any preferment to which such lands belong, as in the case of bishoprics, &c. is in the crown, the attorney-general would be the proper person at whose instance such injunction should be obtained.

Digging stones, &c.

A bill was brought by a patron against a rector, to stay waste in digging stones, &c. on the glebe, other than what was necessary for repairing and improving the rectory, and for an account of what had been dug and sold. The defendant demurred as to the account, as also to the staying the digging of stones, other than for repairs and improvements, and by way of answer set out that the quarries were opened before.

[g] *Stockman* v. *Wither*, Roll. Rep. 89.
[h] *Jefferson* v. *Bishop of Durham*, 1 Bos. & Pul. 105.
[i] 2 Roll. Abr. 813.

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The court said, "The parson had a fee simple, qualified under restrictions in right of the church, but he could not do everything that a private owner of an inheritance could; he could not commit waste, or open mines, but might work those already opened. Even a bishop could not. Talbot, Bishop of Durham, applied to parliament to enable him to open mines, but it was rejected. Parsons may fell timber, or dig stones to repair; they have also been indulged in selling such timber or stones, where the money has been applied in repairs.[k] Injunctions have been granted even against bishops, to restrain them from felling large quantities of timber, at the instance of the attorney-general, on behalf of the crown, the patron of bishoprics. If the demurrer had only gone to an account, it had been good; for the patron cannot have any profit from the living, but it was too general, and must be overruled."[l]

Restrictions as to waste generally.

Where it was sought to restrain a dean and chapter, by injunction, from cutting timber,[m] Lord Eldon said, "If the dean and chapter want the whole of the timber on the premises for the purposes of repairs, there can be no doubt that they would be justified in insisting that the whole should be so applied. Unless the interests of deans and chapters are capable of being distinguished from those of other ecclesiastical bodies in some respect, which I am unable to discern, they have this limited right to the timber." And, alluding to the dictum of Lord Hardwicke, that the timber might be sold if the money was applied in repairs, he says, "If it were otherwise, the obligation imposed upon them would tend greatly to defeat the general intention of law, that the possessions of the church shall constitute a fund for the maintenance of the church; if ecclesiastical bodies are compelled, in every instance, to apply the identical timber, by removing it from the most distant parts of the country in which it may happen that their property lies. I shall only add, as a matter of general observation, which may be applicable in the present instance, that if there should ever happen, by cutting timber for repairs, not to be enough left for the purposes of repairs in future, that would necessarily be a matter of very bad and serious consequence."

Cutting timber.

Timber may be sold and proceeds applied in repairs.

But such injunctions will not be granted at the suit of uninterested persons, and the lessee of an ecclesiastical corporation has not a sufficient interest; the patron only could apply to restrain a rector or vicar: the crown, by its attorney-general, should apply to restrain a bishop. And

By whom injunctions may be obtained.

[k] And see post, Book III. Ch. V.

[l] *Knight* v. *Moseley*, Amb. 176.

[m] *Wither* v. *Dean of Winchester*, 3 Mer. 425.

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it may probably be added that, in all cases, the patron or patrons of the particular ecclesiastical corporations are the persons properly interested, at whose suit an injunction should be asked. If, however, such ecclesiastical corporation should have entered into a particular agreement with its lessee or some other person not to cut timber, &c., such person would probably have his right to apply for an injunction, but this would be upon other principles.[n]

From what acts they would be restrained generally.

From these cases it may be sufficiently inferred what acts may legally be done by ecclesiastical corporations in the lands which they hold *jure ecclesiæ*, and from what acts they would or ought to be restrained; but that which they cannot do themselves, they are, in certain cases and under certain restrictions, empowered to enable their tenants to do by their leases. Of these leases we shall speak in the next chapter; but it may here be observed, that it has been made lawful for them to grant or demise by lease, provided it be made in such manner as we shall after mention, any mines, minerals, quarries or beds belonging to them, together with the right of working, or of opening and working the same; and also all the usual powers for effectuating such purpose, although, as has been already observed, they would have no power to open a fresh mine or quarry in any other manner; and such an act committed by them has been held to be waste.

Section 2.

Leases by Ecclesiastical Corporations.

Confirmation of leases formerly.

Ecclesiastical corporations, whether aggregate or sole, having, as we have seen, but a qualified interest in the lands whereof they were seised in right of their churches, &c., leases made by them of such lands were, at common law, in many cases, not binding on their successors,[o] and the consent of, and confirmation by, some other parties were considered necessary, without which such leases were not valid as against the successor. Thus, the leases of bishops and archbishops were to be confirmed by the dean and chapter; those of deans by the bishop and chapter; those of archdeacons, prebendaries, and the like, by the bishop, dean and chapter; those of parsons and vicars by the patron and ordinary; with variations in certain cases, which it is not now necessary to enumerate.[p]

[n] See *Wither* v. *Dean of Winchester*. [o] Cruise, Dig. tit. 32, ch. v.
[p] Gibs. 744; Wats. c. 44; *Dean of Ely* v. *Stewart*, 2 Atk. 45.

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Enabling statute of Henry VIII.

But by the statute passed in the thirty-second year of Henry VIII. it was enacted, that all leases for terms of years or for life, by any persons having an estate of inheritance in right of their churches, should be good and effectual against the lessors and their successors: provided that nothing therein should extend to give any liberty or power to any parson or vicar of any church or vicarage to make any lease or grant of any of their messuages, lands, tenements, tithes, profits or hereditaments belonging to their churches or vicarages, otherwise or in any other manner than they might have done before the making of that act. This is called an enabling statute; but it went too far, in giving power to persons ecclesiastical to make leases of their lands, and several statutes were consequently passed during the reign of Elizabeth, called disabling statutes, by which all alienations by ecclesiastical persons are declared void, except leases for twenty-one years or three lives.[q]

Disabling statutes of Elizabeth.

Leases under the statutes.

But there are certain circumstances required to be observed by these statutes, without which such leases made by persons ecclesiastical would not be binding on their successors.

First. All such leases must be by deed indented, not by deed-poll or by parol.

Second. They must be made to begin from the day of the making thereof.

Surrender of old lease.

Third. If there be an old lease in being it must be surrendered or ended within one year next after making the new lease. Such surrender must be absolute, not conditional; for otherwise the intention of the statute might be easily evaded by setting up such old lease again, upon breach of the condition.[r]

Upon this third rule the following points have been decided. A surrender in law by the taking a new lease, either to begin presently or on a day to come, seems a good surrender within the statutes; for by taking such new lease, though to commence on a future day, the first lease is presently surrendered and gone, and shall not continue till the day on which the new lease is to commence; but by acceptance of such new lease the first is immediately surrendered, because both leases cannot exist together. As the first cannot be dissolved or surrendered in part, it must be surrendered for the whole.[s]

A surrender upon condition that the lessor should make a new lease within a week after, has been held good.

[q] 1 Eliz. c. 19; 13 Eliz. c. 10; 14 Eliz. c. 11; 18 Eliz. c. 11; 1 James 1, c. 3.
[r] See Cruise, Dig. ante. [s] *Thompson* v. *Trafford*, Poph. 9.

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The lessor of the plaintiff, being a prebendary of Sarum, brought an ejectment to avoid a lease made by his predecessor, as not being conformable to the proviso in the statute 32 Hen. VIII., because the surrender of the former lease was with a condition, that if the then prebendary did not, within a week after, grant a new lease, the surrender should be void; whereby, as it was contended for the plaintiff, the old term was not absolutely gone, but the lessee reserved a power of setting it up again. The court gave judgment for the defendant; this being within the intent of the statute, which was, that there should not be two leases standing out against his successor. Here the new lease was made within the week; from thence it became an absolute surrender, both in deed and in law; the whole was out of the lessee, without further act to be done by him. In the proviso in that statute there was the word *ended* as well as *surrendered*, and could it be said that the first lease was not ended? This was no more than a reasonable caution in the first lessee to keep some hold of his old estate till a new title was made to him.[t]

Concurrent leases.

The statute 18 Eliz. c. 11, s. 2, enacts that all leases to be made by any ecclesiastical or collegiate persons or others within the statute 13 Eliz. c. 10, of any lands, &c. whereof any former lease for years is in being, and not to be expired, surrendered or ended within three years next after the making of any such new lease, shall be void; and by the 3d section of 18 Eliz. all bonds and covenants for renewing any leases contrary to the 13 Eliz. or this statute are declared void. There are, however, some cases in which a bishop, with the consent of the dean and chapter, may make a concurrent lease.

The duration of all leases made under these statutes must not exceed twenty-one years, or three lives, but may be for fewer years or lives; the intention of these statutes being only to abridge the power of making long and unreasonable leases, by reducing them to a determinate number of years or lives, which they should not exceed, but might be made as much under as the party pleased.[u]

If a bishop makes a lease for four lives, and one of them dies in the lifetime of the bishop, so that at his death there are but three lives in being, yet the lease will be void against his successor. For as it was originally void, no subsequent event could make it good.[x]

Lease to A. for lives of B., C. and D. good.

If a lease be made to A. for the lives of B., C. and D., it is a good lease to one for the lives of three other persons,

[t] *Wilson* v. *Carter*, 2 Stra. 1201.
[u] 1 Inst. 44.
[x] 10 Rep. 62 a.

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and a lease to three persons for three lives, is all one within the intent of these statutes, for in both cases three lives are the measure of the estate created, which is all the statutes require.[y] It appears to be understood that a lease for sixty years, if three lives shall so long live, is good within the stat. 32 Henry VIII.[z]

To what these statutes extend.

All leases, made under these statutes, must be of lands or tenements, whereto resort may be had for the rent reserved by distress; for otherwise the heirs or successors of the lessors would be without any remedy for the recovery of the rent. These statutes do not therefore extend to advowsons, tithes, or other incorporeal hereditaments.[a]

To what manors or land stat. 32 Hen. VIII. extends.

The stat. 32 Henry VIII. does not extend to any leases of manors or lands, which have not most commonly been letten to farm, or occupied by the farmer thereof by the space of twenty years next before such leases thereof made. The intention of this clause was to prevent the persons enabled by the statute to demise, from making leases of their mansion houses and demesnes, so as to bind their heirs or successors, as that practice would have produced a great decay of hospitality. Various opinions have been held upon the construction of this clause. The better of them seems to be that it consists of two parts in the disjunctive: if either of them be observed, it is sufficient to support the lease. The first is, which have not most commonly been letten, which is general; the other is, or occupied by the farmers thereof, by the space of twenty years. That the most natural and genuine meaning of the clause is, that the lands to be leased must either be such as have been most commonly letten, that is, such as are not reputed part of the demesnes, or such as have been occupied by the farmers thereof by the space of twenty years.[b]

Construction of clause as to.

If lands have been let or occupied for eleven years or more, at one or several times within the twenty years next before a lease for twenty-one years or three lives, it will be sufficient; and a demise by copy of court roll will be considered as a sufficient letting within the statute.[c]

Reservation of rent.

The stat. 32 Henry VIII. further provides, that upon every such lease there be reserved yearly during the same lease, due and payable to the lessors, their heirs and successors, to whom the same lands should come after the death of the lessors, if no lease had been thereof made, and to whom the reversion thereof should appertain, ac-

[y] *Baugh* v. *Haines*, Cro. Jac. 26. [z] 8 Rep. 69 b.
[a] 1 Inst. 44 b. [b] Cruise's Dig. tit. xxxii. ch. v.
[c] Bacon's Abr. tit. Lease.

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cording to their estates and interests, so much yearly farm or rent or more, as had been most accustomably yielden or paid for the manors, &c., so to be letten within twenty years next before such lease thereof made. It has been a constant practice nevertheless, ever since this statute was made, for bishops to take great fines upon the renewal of leases, of which the validity has never been questioned.

Leases of parts of lands which have been formerly let at certain rents.

It was formerly doubted whether ecclesiastical persons might make a lease of part of lands which had been usually let for a certain rent, reserving a rent *pro ratâ*. But now by the statute 39 & 40 Geo. III. c. 41, it is enacted, that where any part of the possessions of any ecclesiastical person shall be demised by several leases, which was formerly demised by one, or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor, the several rents reserved on the separate demises of the specific parts shall be taken to be the ancient rents; with a proviso that where the whole of such premises shall be demised in parts, the aggregate rents reserved shall not be less than the old accustomed rent, and so in proportion where a part shall be retained in possession by the lessor.

Leases must not be made without impeachment of waste.

The last rule to be observed in respect to leases under these statutes is, that they must not be made without impeachment of waste. For if, as the preamble speaks, long and unreasonable leases are the chief cause of dilapidations, and of the decay of hospitality, much more would they be so if they were made dispunishable for waste.

Leases by parsons and vicars.

Parsons and vicars are expressly excepted out of the stat. 32 Henry VIII., so that they are not, as other sole corporations, enabled by that statute to make any leases to bind their successors without the confirmation of the patron and ordinary, but remain as they did at common law. They are however not restrained by the act of 13 Eliz. from making leases for twenty-one years or three lives, but then such leases must not only be confirmed by the patron and ordinary, but must also be made in conformity to the eight rules already mentioned, otherwise they will not bind the successors. And they are restrained by the act of 13 Eliz. from making leases for any longer time, notwithstanding any confirmation or conformity to the rules before mentioned.

Building leases may be granted for long terms of years.

Ecclesiastical corporations, whether aggregate or sole, have been recently empowered to grant long leases of their lands for building purposes, provided such leases are granted with the consent of particular parties, and with

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certain conditions and restrictions; it being enacted[d] that all ecclesiastical corporations, whether aggregate or sole, may, with the consent and under the restrictions specified, by any deed duly executed, lease their houses or land for any term not exceeding ninety-nine years, to take effect in possession, to any person who may be willing to improve or repair the present or any future houses thereon, or to erect other houses instead thereof, or to erect any houses or other buildings on any lands whereon no building shall be standing, or who shall be willing to annex any part of the same lands to buildings erected or to be erected on the said lands, or otherwise to improve the said premises or any part thereof; and with or without liberty for the lessee to take down any buildings which may be upon the lands in such leases respectively to be comprised, and to dispose of the materials thereof to such uses and purposes as shall be agreed upon; and with or without liberty for the lessee to set out and allot any part of the respective premises to be comprised in any such lease, as ways, yards or otherwise, for the general improvement of the premises; and also with or without liberty for the lessee to dig, take, and carry away and dispose of such earth, &c. as it shall be found convenient to remove.

Restrictions and conditions to be observed in such leases.

The restrictions and conditions, subject to which these leases are to be granted, require to be very accurately observed; for, as ecclesiastical corporations are empowered to grant these leases only so long as these are attended to, a lease, in which any of these are not complied with, would have no validity to bind either the lessor or the lessee. These restrictions are as follows:

As to rent.

1st. There shall be reserved by every such lease the best yearly rent that can be obtained for the premises therein comprised, payable half-yearly or oftener; and so as every such lease be made, without taking any fine, or any thing in the nature thereof, in respect of the making the same.

Building and repair.

2nd. In every such lease made for the purpose of having buildings erected, there shall be contained a covenant on the part of the lessee, to build, complete and finish the houses which may be agreed to be erected on the premises, if not then already done, within a time or times to be specified for that purpose, and to keep in repair, during the term, such houses.

Covenants to be contained in lease.

3rd. There shall also be contained in the last mentioned cases covenants on the part of the lessee substantially to rebuild or repair the same, within a time or times to be

[d] 5 & 6 Vict. c. 108, s. 1.

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specified for that purpose; and to keep in repair during the term the houses agreed to be rebuilt and repaired.

4th. In every lease, whether for building or not, there shall be contained, on the part of the lessee, a covenant for the due payment of the rent, and of all taxes, charges, rates, assessments and impositions whatsoever, affecting the same premises; and also a covenant for keeping the houses erected, and to be erected, on the premises to be therein comprised (except any works or manufactories which may not be insurable) insured from damage by fire, to the amount of four-fifths at least of the value thereof, in some or one of the public offices in London, Westminster, Norwich, Bristol, Exeter, Newcastle-on-Tyne, York or Liverpool, or of the Kent Fire Insurance Company (the particular office of insurance being named in the lease), and to lay out the money to be received by virtue of such insurance, and also all such other sums as shall be necessary, in rebuilding, repairing, and reinstating such houses as shall be destroyed or damaged by fire, and also to surrender the possession of and leave in repair the houses on the premises therein comprised, on the expiration or other sooner determination of the term thereby granted; and within twenty-one days after any assignment of such lease shall be made, to deliver a copy of such assignment to the lessor or reversioner for the time being.

5th. In every such lease there shall be contained a power for the lessor or reversioner for the time being, and his or their surveyors and agents, to enter upon the premises, and inspect the condition thereof; and also a condition of re-entry for nonpayment of the rent, or for nonperformance of any of the covenants and conditions, and with or without a proviso that no breach of any of the covenants and conditions (except the covenant for payment of the rent, and other such covenants or conditions, if any, as may be agreed between the parties to be so excepted) shall occasion any forfeiture of such lease, or give any right of re-entry, unless judgment shall have been obtained in an action for such breach of covenant; nor unless the damages and costs to be recovered in such action shall have remained unpaid for the space of three calendar months after judgment shall have been obtained in such action.

6th. The respective lessees shall execute counterparts.

Power to reserve increased rent.

But, notwithstanding the first of these restrictions, it is enacted, that on any such building or repairing lease, the corporation granting such lease may reserve a small rent during the six first years of the term, or during any of such six first years, to be specified in such lease; and in addition

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to the rent to be so reserved, an increased rent to become payable after the expiration of the time so specified; or make any such increased rent, first payable at any time not exceeding six years after the commencement of the term created by such lease, when a stipulated progress shall have been made in the buildings, rebuildings or reparations, in respect of the erection, construction or reparation, of which the same lease shall have been granted.[e]

Consent of certain parties necessary to such leases.

As to the consent which is necessary in order to give validity to such leases, it is declared that every lease, made under the provisions of this act, shall be—

1st. With the consent of the ecclesiastical commissioners.

2nd. With the consent of the patron, when made by an incumbent of a benefice.

3rd. Any lease by any corporation, whether aggregate or sole, of any lands or houses, mines, &c., of copyhold or customary tenure, or of any watercourses, ways or easements, in, upon, over, or under any such lands, where the copyhold or customary tenant thereof is not authorised to grant or make leases for the term of years intended to be created by such lease without the license of the lord of the manor, shall be made with the consent of the lord for the time being of the manor of which the same shall be holden, in addition to the other requisite consents; and such consent shall amount to a valid license to lease such lands, houses, mines, &c. for the time for which the same shall be expressed to be demised by such lease.[f]

Testified by execution of deed.

The consent of every person, whose consent is required to any deed, is to be testified by his being party to and executing it.[g]

Parties to consent in certain cases.

When the patronage of any benefice, the consent of the patron of which is requisite, is in the crown, if such benefice shall be above the yearly value of 20*l.* in the king's books, the instrument, by which such consent is to be testified, shall be executed by the lord high treasurer, or first commissioner of the treasury; and if such benefice shall not exceed the yearly value of 20*l.* in the king's books, such instrument shall be executed by the lord chancellor, lord keeper, or lords commissioners of the great seal; and if such benefice shall be within the patronage of the crown in right of the duchy of Lancaster, such instrument shall be executed by the chancellor of the duchy; and when the patronage shall be part of the possessions of the duchy of Cornwall, the instrument by which such consent or concurrence is to be testified shall, whenever there shall

[e] Sect. 2. [f] Sect. 20. [g] Sect. 21.

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be a Duke of Cornwall, whether he be of full age or otherwise, be under his great or privy seal; or if there be no Duke of Cornwall, and such benefice shall be in the patronage of the crown in right of the duchy of Cornwall, such instrument shall be executed by the same person or persons, who is or are authorised to testify the consent of the crown; and such instrument, being so sealed or executed, shall be deemed and taken, for the purposes of this act, to be an execution by the patron of the benefice.[h]

Where the patron of any benefice or lord of the manor, whose consent is requisite, is a minor, idiot, lunatic, or feme covert, or beyond seas, it shall be lawful for the guardian, committee, husband, or attorney, as the case may be, of such patron or lord, but in case of a feme covert not being a minor, idiot, or lunatic, or beyond the seas, with her consent in writing, to execute the instrument by which such consent is to be testified.[i]

The person or persons, if not more than two, or the majority of the persons, if more than two, or the corporation who or which would, for the time being, be entitled to the turn or right of presentation to any benefice, if the same were then vacant, shall, for the purposes of this act, be considered to be the patron thereof; provided that, in the case of the patronage being exercised alternately by different patrons, the person or persons, if not more than two, or the majority of the persons, if more than two, or the corporation who or which would, for the time being, be entitled to the second turn or right of presentation to any benefice, if the same were then vacant, shall, for the purposes of this act, jointly with the person or persons, or corporation, entitled to the first turn or right of presentation, be considered to be the patron thereof.[k]

The same person may consent in more than one character, if necessary.[l]

Corporations aggregate are to signify their consent under their common seal.[m]

Land may be leased for streets, &c.

In granting these leases, ecclesiastical corporations are empowered, in like manner, and subject to the same restrictions and consent, to grant land, or streets, yards, gardens, sewers, &c., or give such privileges or easements as may be thought reasonable.[n]

Water, water-leaves, and way-leaves, &c., may be leased for 60 years.

Besides the power given to them to grant land on building leases, ecclesiastical corporations are by the same act empowered, with such consent as has been already mentioned, to grant, by way of lease, any water flowing in or

[h] Sects. 22, 23. [i] Sect. 24. [k] Sect. 25.
[l] Sect. 26. [m] Sect. 27. [n] Sect. 3.

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upon their lands, and also any way-leaves or water-leaves, canals, water-courses, tram-roads, railways, and other ways, paths, or passages, either subterraneous, or over the surface of any lands, store-yards, wharfs, or other like easements or privileges, in, upon, out of, or over any part or parts of their lands, for any term or number of years, not exceeding sixty years, to take effect in possession.[o]

Subject to restrictions.

The restrictions and conditions, subject to which these last-mentioned leases may be granted, are the following:

1st. So as there be reserved on every such lease payable half-yearly, or oftener, during the continuance of the term of years thereby created, the best yearly rent or rents, either in the shape of a stated or fixed sum of money, or by way of toll or otherwise, that can be reasonably gotten for the same, without taking any fine, or any thing in the nature thereof, other than any provision or provisions which it may be deemed expedient to insert in any such grant, rendering it obligatory on the grantee or lessee to repair or contribute to the repair of any roads or ways, or to keep open or otherwise use, in any specified manner, any water or watercourse, to be comprised in or affected by any such lease.

2nd. So as there be contained in every such lease a power of re-entry, or a power to make void the same, in case the rent thereby reserved, or any part thereof, shall not be paid within the time therein specified.

3rd. So as the respective grantees or lessees execute counterparts of the respective leases.[p]

Mining leases may be granted.

Ecclesiastical corporations are further, by the same act, empowered, with such consent as has been already mentioned, to lease for any term, not exceeding sixty years, to take effect in possession, any mines, minerals, quarries, or beds, together with the right of working, or of opening and working, the same, and of working any adjacent mine, by way of outstroke or other underground communication, and together also with such portion of land belonging to such corporation, and all such rights of way and other rights, easements, &c. incident to mining operations, as shall be deemed expedient; and every such lease shall contain such reservations by way of rent, &c., and such powers, restrictions, and covenants, as shall be approved *by the ecclesiastical commissioners*, due regard being had to the custom of the country within which such mines, &c. are situate; and no fine, nor any thing in the nature thereof, shall be taken for or in respect of any such lease.[q]

Houses of resi-

The act does not authorise the granting of a lease, or

[o] Sect. 4. [p] Sect. 4. [q] Sect. 6.

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dence, with gardens, &c. excepted from the powers of the act.

the laying out or appropriating the palace or usual house of residence of any archbishop or bishop, or any other corporation sole, or of any corporation aggregate, or any member of any corporation aggregate, or of any offices, outbuildings, yards, gardens, orchards, or pleasure-grounds to any such palace or other house of residence, adjoining or appurtenant, and which may be necessary or convenient for actual occupation with such palace or other house of residence, or the grant or lease of any mines, &c. the grant whereof may be prejudicial to the convenient enjoyment of any such palace or house of residence, or the pleasure-grounds belonging thereto, or the leasing of any lands which any such corporation is expressly restrained from leasing, by the provisions of any local or private act of parliament.[r]

Such are the important new powers which are by this act conferred upon ecclesiastical corporations, in respect to leasing; various details are also provided for; power is given to confirm leases which would be voidable for informality, and to accept surrenders and grant new leases. The act does not interfere with any existing powers of leasing, by way of renewals or otherwise, but, after lands have been once leased under the act, they are not to be leased again, except at rack rent.[s]

Effect of due execution of the lease.

Leases may be made on surrender of existing leases.

Existing under-leases.

The execution of the leases by the necessary consenting parties is to be conclusive evidence that the matters required to be done, previously to granting such lease, have been performed. Leases under the act may be made on the surrender of any existing leases; but under-leases, which may have been granted previously to such surrender, need not be surrendered; but if any subsisting under-lease contains a covenant for renewal, a renewal is not to be compelled under the covenant except upon the terms of securing to the under-lessor a rent bearing the same proportion to the whole rent, upon the new lease granted under this act, as the amount which, upon any ordinary renewal, ought to have been paid by such under-lessee, would have borne to the whole amount of the fines and fees attending such renewal.[t]

Surveyor to be appointed.

Whenever any lease is to be granted under the authority of this act, a competent surveyor is to be appointed in writing by the ecclesiastical commissioners, with the consent of the corporation proposing to lease, and such surveyor is to make any such report, map, plan, statement, valuation or certificate, as shall be required by the commissioners, or by such corporation.[u]

[r] Sect. 9. [s] Sect. 8. [t] Sect. 17. [u] Sect. 18.

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Counterparts of leases, &c. to be deposited, and to be open to inspection.

The counterpart of every lease, &c. granted under the authority of this act, and the map, plan, certificate, valuation and report relating thereto, is, within six calendar months after its date, to be deposited with the ecclesiastical commissioners, who are thereupon to give to the corporation on whose behalf it has been deposited a certificate of such deposit having been made. Documents so deposited are to be produced, at proper hours, to the corporation depositing them, or to the patron of the benefice, or to any person applying to inspect them on their behalf; and an office copy, certified under the seal of the commissioners, which office copy the commissioners are in all cases to give upon proper application made, is to be admitted and allowed in all courts as legal evidence of its contents, and of its due execution by the parties who, upon the face of such office copy, shall appear to have executed the same, and of the due execution by the lessee of the counterpart thereof.[x]

Fines, &c. if taken, make void the lease.

If in the case of any lease, &c. granted under this act, any fine, or any thing in the nature thereof, shall directly or indirectly have been paid or given by or on behalf of the lessee, and taken or received by the lessor, such lease, grant or confirmation, shall be absolutely void.[y]

Lands held in trust for ecclesiastical corporations.

The benefit of this act is likewise extended to lands which are held in trust for ecclesiastical corporations; for whenever any lands are vested in any trustees for the benefit of such corporations, in such manner that the net income, or three-fourths of it at least, is payable for their benefit, all the powers which are given by the act may be exercised by such corporation; but in order to give legal effect to such leases, &c. the trustees must be made parties, in addition to the other parties, whose concurrence is required by the act. Trustees are required to execute such deeds when tendered to them for that purpose, after they have been duly executed by the corporation, and the act further provides for their indemnity in such cases.[z]

Improved value of sees to be paid to the commissioners.

The increased revenues which would accrue to ecclesiastical corporations in consequence of the leases which they are empowered to make under this act, is not in all cases to be at their disposal, or for their benefit, but is to go to increase the general fund in the hands of the ecclesiastical commissioners. Thus, in the case of any see, the revenues of which may be thus improved, the annual sum, if any, directed to be charged upon the revenues of such see, by any order in council, shall be forthwith directed to be increased to the extent of such improvement; or the

[x] Sect. 29. [y] Sect. 30. [z] Sect. 28.

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annual sum (if any) directed by any like order to be paid to the bishop of such see, shall by the like authority be forthwith directed to be reduced to the like extent, or to be altogether annulled, if not exceeding such improvement; and if such improvement shall exceed the annual sum so directed to be paid to such bishop, or if no annual sum shall have been directed to be paid by or to such bishop, then a fixed annual sum, equal to the excess in the one case, or to the whole of such improvement in the other case, shall by the like authority be forthwith directed to be charged upon the revenues of such see; and the increased, or reduced, or new payment, shall take effect upon the avoidance of the see next after such improvement.[a]

So of deans and chapters.

The improved value of the property of deans and chapters, and archdeacons, is in like manner to be paid to the commissioners, leaving to such corporations respectively such amounts as have been already mentioned in speaking of those parties.[b]

Increased value of benefices above a certain amount.

In the case of any benefice, the annual value of which shall be thus improved, it shall be lawful, by the authority of the ecclesiastical commissioners, at any time within three years from the date of such lease, to direct that from and after the next vacancy of such benefice such portion of the rent or other consideration reserved by such lease, as by the like authority shall be deemed expedient, shall be paid, and the same shall accordingly from time to time be paid, to the ecclesiastical commissioners, and shall be by them applied in making additional provision for the cure of souls: provided that notice shall be given to the patron of such benefice, of any scheme affecting the same, three calendar months previously to such scheme being laid before the queen in council; and the objections (if any) of such patron shall be laid before the queen in council, together with such scheme: provided also, that the average annual income of such benefice shall not, under this provision, be left at a less sum than 600*l.* if the population amount to two thousand, nor at a less sum than 500*l.* if the population amount to one thousand, nor in any other case at a less sum than 300*l.*: provided also, that, in making any such provision for the cure of souls, out of rents, &c. reserved by any such lease, the wants and circumstances of the places in which the lands demised by such lease are situate shall be primarily considered.[c]

Part of improved value by mining leases to be in all cases paid to the commissioners.

In the case of any mining leases granted under this act, it is provided, that such portion of the improved value accruing thereunder, as by the like authority shall be de-

[a] Sect. 10. [b] Sect. 11. [c] Sect. 13.

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termined, not being more than three-fourth parts, nor less than one moiety of such improved value, shall forthwith, and from time to time as the same shall accrue, be paid to the ecclesiastical commissioners; and the remainder of such improved value shall be deemed to be an improvement within the meaning of the provisions relating to the incomes of archbishops and bishops, deans and canons, archdeacons, and incumbents of benefices respectively; that is to say, that in all cases where mining leases are granted, some part of the rent is to be paid to the commissioners, whatever may be the value of the benefice.

Farm leases by incumbents.

Incumbents of benefices are also now empowered by an act of parliament[d] passed in the same year as the act which has been last mentioned, to demise their lands for a term certain for farming purposes.

For terms of 14 years.

The lease for such purposes must be by deed, with the consent of the patron and the bishop and of the lord of the manor; if the lands are copyhold, such consents to be testified by their being parties to and executing the deeds; and such lease may be for any term not exceeding fourteen years, to take effect in possession.

Subject to restrictions, conditions, &c.

The restrictions and conditions, subject to which such leases may be granted, are,

1st. There shall be reserved in every such lease, payable to the incumbent quarterly in every year during the continuance of the term thereby granted, the best yearly rent that can be reasonably gotten for the same, without taking any fine, or any thing in the nature thereof, for granting such lease.

2nd. No such lessee shall be made dispunishable for waste by any clause or words to be contained in such lease.

Covenants in the lease.

3rd. The lessee shall thereby covenant with the incumbent granting the lease and his successors:

a. For due payment of the rent thereby to be reserved, and of all taxes, charges, rates, assessments and impositions whatsoever which shall be payable in respect of the premises thereby leased.

b. That he will not assign or underlet any of the hereditaments comprised in such lease for all or any part of the term thereby granted, without the consent of the bishop of the diocese, and the patron and incumbent of the benefice, to be testified by their respectively being parties to and sealing and delivering the deed or instrument by which any such assignment or under-lease may be effected.

c. That he will in all respects cultivate and manage the

[d] 5 Vict. c. 27.

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lands thereby leased according to the most improved system of husbandry in that part of the country where such lands are locally situated, so far as such system may not be inconsistent with any express stipulation to be contained in such lease.

d. That he will keep and at the end of the term leave all the lands comprised in such lease, together with the gates, drains and fences of every description, and other fixtures and things thereupon, or belonging thereto, in good and substantial repair and condition.

e. That he will, at all times during the continuance of the term, keep the buildings comprised in such lease, or to be erected during the term upon the lands thereby demised, or on any part thereof, insured against damage by fire, in the joint names of the lessee and of the incumbent of the benefice for the time being, in three-fourths at the least of the value thereof; and that he will lay out the money to be received by virtue of any such insurance, and all such other sums of money as shall be necessary in substantially rebuilding, repairing and reinstating, under the direction of a surveyor to be for that purpose appointed by the incumbent of such benefice for the time being and such lessee, by some writing under their respective hands, such messuages or buildings as shall be destroyed or damaged by fire.

4th. There shall be inserted in every such lease a reservation, for the use of such incumbent and his successors, of all timber trees, and trees likely to become timber, and of all saplings and underwoods, and of all mines and minerals.

5th. There shall also be inserted a power of re-entry, in case the rent thereby to be reserved shall be unpaid for the space of twenty-one days next after the same shall become due, or in case the lessee shall be convicted of felony, or shall become a bankrupt, or shall take the benefit of any act of parliament for the relief of insolvent debtors, or shall compound his debts, or assign over his estate and effects for payment thereof, or in case any execution shall issue against him or his effects, or in case such lessee shall not from time to time duly observe and perform all the covenants and agreements on his part in such lease to be contained.

6th. The lessee in each such lease shall execute the same or a counterpart thereof.

Certain covenants shall not be considered premiums, &c.

Any stipulation, covenant, condition or agreement in any such lease, on the part of the lessee, for the adoption and use of any particular mode or system of cultivation,

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or for the drainage, or subdividing, or embanking or warping of all or any of the lands comprised in such lease, or for the erection of any new or additional farm-houses, barns, &c., which may be requisite, or for repairing or making any substantial improvements on the premises, or for the payment of any additional rent or rents, or penalty on breach of any of the covenants or agreements contained in any such lease, shall not be deemed or construed to be a fine or consideration for granting such lease within the meaning of the act: nor is any thing in the act to be taken to preclude the lessor from covenanting that the lessee shall be entitled to have or take from off the demised premises brick earth, stone, lime, or other materials for the erection or repair of any buildings, or for the construction or repair of drains, or for any other necessary improvements, and sufficient rough timber, to be assigned by the incumbent for the time being or his agent duly authorised, for any of such purposes aforesaid, and for the making or repair of gates and fences: and the custom of the country as to outgoing tenants shall apply to each lease to be granted under the act, except so far as the lease shall contain any express stipulation to the contrary.

Term may be 20 years in certain cases.

The term to be granted by any such lease may be twenty instead of fourteen years where the lessee shall covenant in his lease to adopt and use any mode or system of cultivation more expensive than the usual course, or to drain or subdivide, or embank and warp, at his expense, any part of the premises, or to erect, at his own expense, on the premises, any buildings, or to repair in a more extensive manner than is usually required of lessees of farms any buildings on the premises, or in any other manner to improve the premises at his expense.[e]

House and certain glebe lands excepted.

From the lands which may be demised under the power thus conferred, there is an exception as to the parsonage-house, garden and premises, and as to ten acres of glebe which may be situated conveniently for occupation, and which must be reserved out of such lease, unless the glebe is more than five miles from the parsonage, in which case the exception does not apply.[f]

Particulars to be observed in grants of such leases.

The details and matters to be observed in the grant of these farm leases are,

That before any such lease is granted, a surveyor is to be appointed, who is to make maps, certificates, valuations and reports, as directed in the act, respecting such proposed lease; or if there is any existing map of the lands, it may be used by him for this purpose.[g]

[e] Sect. 1. [f] Sect. 2. [g] Sect. 3.

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The execution of such lease by the bishop and patron is to be conclusive evidence that the lands are proper to be leased, that the rent is the best that can be gotten, and that all the covenants are proper.[h]

A lease granted under the act can only be surrendered by a deed, to which bishop, patron and incumbent are all parties; and such surrenders have operation only from the time when such deed is duly executed by such parties.[i]

In cases of peculiars belonging to bishops, such bishops are to exercise within their peculiars the several powers which they are called upon by the act to exercise.[k]

Consent requisite.

The provisions of the act as to the persons by whom consent is to be given in particular cases, are similar to those of the act before mentioned for enabling building leases to be granted; and the powers of the act are made to extend to lands, &c. held in trust for incumbents in the same manner and according to the same provisions as have been already mentioned in speaking of the former act.[l]

Incumbent's part of maps, &c. to be deposited in the registry of the diocese.

The part of every such lease belonging to the incumbent, or in case there shall not be more than one part of any such lease, an attested copy thereof, and every surrender to be made under this act, together with the writing by which a surveyor shall have been appointed, and the map or plan, or copy of or extract from a map or plan, certificate, valuation and report directed to be made before the granting of such lease, shall, within six calendar months next after the date of such lease, be deposited in the office of one of the registrars of the diocese wherein such benefice shall be locally situated, to be perpetually kept and preserved therein, except where the benefice shall be under the peculiar jurisdiction of any archbishop or bishop, in which case the several documents before mentioned shall be deposited in the office of the registrar of the peculiar jurisdiction to which such benefice shall be subject; and such registrars respectively, or their deputies, shall, upon any such deposit being so made, sign and give to the incumbent a certificate of such deposit; and such lease or attested copy and other documents so to be deposited shall be produced at all proper and usual hours, at such registry, to the incumbent of the benefice for the time being, or to the patron of such benefice for the time being, or to any person on their or either of their behalf applying to inspect the same; and an office copy thereof, respectively certified under the hand of the registrar or his de-

[h] Sect. 4.
[i] Sect. 5.
[k] Sect. 6.
[l] See these provisions ante.

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puty (and which office copy, so certified, the registrar or his deputy shall in all cases, upon application in that behalf, give to the incumbent for the time being of such benefice,) shall, in any action against the lessee, and in all other cases, be admitted and allowed in all courts whatsoever as legal evidence of the contents of such lease, or of any such other document, and of the due execution of the counterpart of such lease by the lessee, if there shall be any counterpart, and of the due execution of the lease, and of every other document, by the parties who, on the face of such office copy, shall appear to have executed the same: and every such registrar shall be entitled to the sum of five shillings for so depositing such documents and for certifying the deposit thereof, and the sum of one shilling for each search and inspection, and the sum of sixpence, over and besides the stamp duty (if any), for each folio of seventy-two words of each office copy so certified.

Office copies to be evidence.

Fees to the registrar.

Section 3.

Purchase and Alienation of Lands by Ecclesiastical Corporations.

Ecclesiastical corporations may hold those freehold estates that have been transmitted to them by their predecessors. They are however prohibited by several ancient and modern laws, usually called the statutes of mortmain, from purchasing more lands without a license from the crown. But the power of suspending statutes by regal authority only, being declared illegal at the Revolution, it was deemed prudent to give a parliamentary sanction to licenses in mortmain. This was done by 7 & 8 Will. III. c. 37, by which it was enacted that it should be lawful for the king, his heirs and successors, to grant to any person or persons, bodies politic or corporate, their heirs and successors, licenses to alien in mortmain, and also to purchase, acquire, take and hold in mortmain, in perpetuity or otherwise, any lands, tenements, rents or hereditaments whatsoever.[m]

Prohibited from purchasing generally.

It was formerly the practice, before a license of mortmain was granted, to sue out a writ of *ad quod damnum*, in order to ascertain whether such a license would be prejudicial to the king or others. But Mr. Hargrave says that he was well informed that writs of this kind had not

Licenses of mortmain.

[m] 1 Inst. 99 a, n. 1.

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been usual on granting mortmain licenses since the statute 7 & 8 Will. III.[m]

It would be unnecessary to enter in detail into any of the provisions of these statutes of mortmain, because the prohibition from acquiring lands is the general rule, from which all the excepted cases will be noticed in the following sections. Blackstone observes upon the address and subtle contrivances by which ecclesiastics were for a long time able to avoid the effect of the statutes, until successive parliaments, pursuing them through all their finesses, at last, though with difficulty, gained the victory.[n]

Prohibited from alienating generally.

And as ecclesiastical corporations are restrained from acquiring lands, so are they by the statutes 1 Eliz. c. 19, and 13 Eliz. c. 10, restrained, generally, from every mode of alienation except leasing, which has been already treated of. As this restriction is also the general rule, it will be unnecessary to enter into details. It follows as a consequence, and is further declared by statute,[o] that all chargings of any benefice with cure with any pension or any profit out of the same, so far as any such charge would continue beyond the life of the incumbent granting it, would be altogether void. During the life of the incumbent it appears to be considered that the charge is not so much upon the benefice as upon the interest of the incumbent therein, so that such charges are not attended to until all the payments usually made out of the profits for the use of the benefice in every way have been fully satisfied.[p]

Charging benefices.

Protection against alienation.

The alienation of lands, the property of ecclesiastical corporations, is prevented to that extent, that they can neither bar their successors by wilful alienation, nor by their neglect to take care of their own, until a considerable lapse of time has been permitted. Thus the right to them cannot be barred by a fine levied by the parties in possession, nor, since the passing of the statute of 3 & 4 Will. IV. c. 72, by the more simple mode of assurance, substituted in lieu of a fine. For ecclesiastical corporations (and in general all ecclesiastical persons), who were seised in right of their churches only, and had not an absolute estate in their possessions, being restrained from alienations, save in such manner as we have before mentioned, were not only prohibited from levying fines, but could not even bar their successors by their nonclaim.

[m] See 1 Cru. Dig. 53, 54. [n] 2 Black. Com. 268.

[o] 13 Eliz. c. 20, repealed by 43 Geo. 3, c. 84, and revived again by 57 Geo. 3, c. 99.

[p] See post, Sequestration.

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Fine and nonclaim in case of corporation aggregate.

Thus in a case in 13 James I.[q] where a fine and five years nonclaim was set up in bar to an ejectment, brought by the president and fellows of Magdalene College, one of the points was, whether the president and fellows were barred by the fine and nonclaim, and it was resolved, that the right of the college was not barred, for the words of the statute 13 Eliz., which prohibits all ecclesiastical corporations from alienation, were, "That all leases, gifts, grants, feoffments, conveyances, or estates to be made, had or suffered by any master and fellows of any college, &c., *to* any person or persons, &c. (except leases), shall be utterly void, and of none effect, to all intents, constructions and purposes." So that when a fine was levied, and no claim was made for five years, there was a conveyance permitted and suffered by the president and fellows of the college; and it would have been of no effect to have prohibited the president and fellows themselves from making conveyances of their lands, if they were allowed to have a power by their permission and nonclaim to bar their successors.[r]

Corporation sole, when barred by nonclaim.

A bishop, dean, or any other ecclesiastical corporation sole, might be himself barred by his own nonclaim; as, if he neglected to make his claim within five years after a fine was levied of an estate, to which he was entitled in right of his bishopric, &c. he would be barred during his life; but his successors would, in such a case, be allowed five years to avoid the fine, from the time of their becoming entitled to the lands; and formerly this would have extended to the case of each successor, as according to the old doctrine, *nullum tempus occurrit ecclesiæ.*

Term of sixty years, or two incumbencies and six years.

But now by the statute 3 & 4 Will. IV. c. 27, it is enacted, "That it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual and eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as is there mentioned, next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or to bring such action or suit, shall have first accrued, that is to say, the period during which two persons in succession shall have held the office or benefice, in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies, and such term of six years, taken together, shall amount to the full

[q] *Magdalen College case*, 11 Rep. 78 b; 1 Roll. Rep. 151.
[r] See *Howlet* v. *Carpenter*, 3 Keb. 775.

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period of sixty years; and if such times taken together shall not amount to that full period, then during such further number of years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years.

Present state of the law.

Whether, therefore, the alienation of lands, formerly the property of an ecclesiastical corporation sole, has been made by fine, or by a substituted assurance in lieu thereof, or by mere laches and nonclaim, the two first successors cannot be bound thereby; and the alienation is at any time voidable at their instance, and so with the third successor during the first six years of his incumbency; nor would it make any difference in his right, although the two preceding incumbencies might have together lasted for a century or more. And the alienation would be also voidable at the instance of a succeeding incumbent, although twenty or more incumbencies might have intervened, until full sixty years had elapsed, since the time at which a right to make such entry or distress, or to bring such action or suit, as in the act mentioned, had occurred. So that the two events must concur ere the successor can be barred of his right; the lapse of sixty years, and the lapse of two whole incumbencies, with the first six years of the third.

Exception in case of leases under special powers.

But in a case where a special act of parliament empowered a vicar, with the approbation of the vestry for the time being, to grant or demise a certain piece of land (which had been assigned to him as a provision under a former act) to any person or persons whomsoever, for such term or number of years, at and under such rent, reversions, and payments as to him and them should seem meet; and by virtue of the power so given to him, the vicar had demised the piece of land for 999 years, so as in fact to amount to a complete alienation of it, it was attempted by a succeeding vicar to set aside the lease as inequitable, and an information and bill were filed in Chancery for that purpose. The Court held that, as the provisions of the act of parliament appeared to have been complied with, there was no case for its interference; and, notwithstanding the excessive length of the lease, the demurrer to the bill was allowed; and in that case it was also said, that the attorney-general was not a proper party in a case of that kind, but that the vicar might alone have filed a bill; that the king or his attorney-general had no other interest in a suit of that nature, than that of vindicating the rights of the church; which interest was the same in the case of tithes subtracted, in which the attorney-general never joins in a suit for the recovery of them.

When attorney-general should be a party in setting aside too long leases.

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And it may be inferred generally, from what was said in the above case, that except where the patronage is vested in the crown, the attorney-general would not be a necessary party in a proceeding to set aside the leases of ecclesiastical corporations sole.[s]

Section 4.

Exceptions from the Statutes of Mortmain.—Exchange of Glebe Lands.

Difficulties of, formerly.

In consequence of the double restriction before spoken of, upon the purchasing or alienating lands, it was impossible for ecclesiastical persons to effect any exchanges of their lands, however beneficial such an exchange might have been for all parties, without some special act of parliament passed for that particular purpose, or as appears by the books to have been done upon at least one occasion,[t] a decree made in Chancery to confirm an exchange of glebe for other lands.

In fact, so great was formerly the difficulty of effecting a legal and valid exchange of glebe for other lands, that Dr. Burn mentions a practice that had sometimes obtained, without the sanction, or rather in defiance of the law.

As exchanges, he says, in either of the ways abovementioned, viz. by special act of parliament, or by decree in chancery, cannot be made without considerable expense, it hath been sometimes practised (especially in laying together small quantities of land for the sake of enclosure and improvement) for the incumbent to make an exchange during his own time, in which his successors will also find the same advantage, until by length of time all remembrance where the lands formerly lay shall be worn out; which, although it doth not operate to effect a legal title, yet no person being grieved thereby, will probably never be inquired into and disannulled.[u]

A practice more unsafe, inefficient, and likely to be productive of litigation, it is scarcely possible to conceive; for it is not always real, but as frequently supposed grievance, or some quarrel *aliunde* that leads to litigation on such matters; and like all other matters in which the strict legal method is departed from, the advantage to be imme-

[s] *Attorney-General* v. *Moses and others*, 2 Madd. 294.
[t] *Morgan* v. *Clerk*, Ch. R. 5 Car. and cited in Burn, E. L.
[u] 2 Burn, E. L. 301.

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diately derived could scarcely ever compensate for the possible future inconvenience.

First allowed in particular cases.

The impossibility of effecting legal exchanges of glebe lands was found to be so great an inconvenience, that in legislating for the augmentation of livings under Queen Anne's Bounty, the opportunity was taken for excepting such cases from the inconvenient general rules of restriction; and it was enacted, that it should be lawful for the incumbent, patron, and ordinary of any such augmented living or cure, to exchange all, or any part of the estate so settled, for the augmentation thereof, for any other estate in lands or tithes of equal or greater value, to be conveyed to the same uses;[x] and subsequently *all* messuages and lands belonging to such augmented livings, that is, whether belonging to such benefices originally or given to them in augmentation, were permitted to be exchanged in like manner.[y]

Now permitted generally.

The general restrictions against exchange have, by the statute 55 Geo. III. c. 147, been removed; and the present state of the law upon that subject, so far as regards direct exchange, is, for the most part, regulated by that act, whereby it is made lawful for the parson, vicar, or other incumbent for the time being, of any ecclesiastical benefice, by deed indented and registered as is therein mentioned, with the *consent of the patron* of such benefice and of the *bishop of the diocese*, to grant or convey to any person or persons, or corporations sole or aggregate, the parsonage or glebe house, with the appurtenances, and the glebe lands, and any pastures, feedings, or right of common or way appendant, or any parts of the same belonging to any such benefice, in exchange for any house, buildings, gardens, &c., and any lands, whether lying within the local limits of such benefice or not, so as that the same be situate conveniently for actual residence or occupation by the incumbent thereof. This part of the enactment would get rid of the prohibition against the alienation of glebe lands; but it was also necessary to get rid of the Mortmain Acts, and to enable the ecclesiastical corporation to accept and take the lands given in exchange. It was therefore by the same act also made lawful for the parson, vicar, or incumbent for the time being of such benefice, by the same or a like deed, and with the like consent, to accept and take in exchange, to him and his successors for ever, from any person or per-

[x] 1 Geo. 3, st. 2, c. 10.

[y] 43 Geo. 3, c. 107; see also the Gilbert Act; but it seems quite unnecessary to speak of any powers of exchange prior to 55 Geo. 3.

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sons, or corporation sole or aggregate, any other house buildings, &c. and any other lands, being of greater value or more conveniently situate, in lieu of and exchange for such lands, &c. so granted and conveyed.

The lands, &c. thus taken in exchange by the incumbent must be of greater value, or more conveniently situated, than those given up by him in exchange; so that if the requisite consent were given, and the premises to be taken in exchange were evidently more conveniently situated, it seems that they might be of less value than those given up by the incumbent for them; and such lands, &c. must moreover be of freehold or copyhold tenure.

House, &c. taken in exchange is for ever to be the house of residence, &c.

The house, buildings and appurtenances, lands, &c. so to be accepted and taken in exchange by the incumbent, shall for ever, after such grant and conveyance thereof, be the parsonage and glebe house, or glebe lands and premises of the benefice, to all intents and purposes whatsoever, and shall be holden and enjoyed by the incumbent and his successors accordingly, without any license or writ of *ad quod damnum*.[a]

Copyhold becomes freehold when exchanged to the incumbent.

If the whole or any part of the premises so annexed were, prior to the annexation, of copyhold tenure, they shall, after such annexation, become of freehold tenure, notwithstanding any law to the contrary; and in that case the lands given by the incumbent in exchange for them shall become of copyhold tenure, in the same way as the lands, in exchange for which they were given, were prior to the annexation.[a]

When exchanged lands are exempt from tithes.

And so with respect to tithes; for, as we shall hereafter observe, by common law, the glebe lands given in exchange would at once become subject to tithe, so soon as they ceased to be the property of the Church. But it is enacted by this statute, that in case the lands conveyed to the parson, &c. as the new glebe, were exempt or discharged from tithe, or covered with any modus or composition in lieu thereof prior to such annexation, then the old glebe lands given up by the parson, &c. in exchange for them, shall, *if situated in the same parish*, and in the absence of any express agreement between the parties to the contrary, become exempt or discharged from tithes, or covered by the modus or composition, as the case may be, in like manner.[b]

After exchange, the incumbent not to be evicted.

The object of the act is to make the exchange of so complete a nature, that the land formerly glebe, and given up by the incumbent in exchange, shall, in the hands of

[a] Ibid. [a] 6 Geo. 4, c. 8, s. 3. [b] 55 Geo. 3, c. 147. s. 2.

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its new possessor, be liable to every contingency to which the land given up by him might have been liable; and therefore, and also for the purpose of quieting the possession of the incumbent in his new glebe, it is enacted, that he shall not be evicted or ejected from the peaceable possession or enjoyment of the house or lands given to him in exchange by reason of any person or persons, or corporation sole or aggregate, claiming any right thereto through any title prior to that of, or through any defect of title of, the person or persons, corporation sole or aggregate, who may have granted or given up the same in exchange. But any such person or persons, or corporation claiming such right, are by that act authorised and empowered to use all such and the same powers and remedies in trying their right to, and in obtaining and recovering possession of, any house, lands and premises which may have been granted in exchange by the incumbent, as they would have been enabled to use in trying the right to, and in obtaining and recovering possession of, the house, land or premises, in exchange for which the same shall have been granted or given up by such incumbent under the authority of the act.[c]

It was at first provided, that if copyholds were given in exchange, they must have held of some manor belonging to the benefice; and also that only thirty acres could be exchanged: but both these restrictions have been since repealed.[d]

We must refer to the next section for the various details which are to be observed and attended to prior to and in the exchange of lands under this act; for the various directions in that respect are in the statute so completely intermixed with the directions relating to lands purchased as glebe, that any attempt to analyse them separately would lead to much unnecessary repetition.[e]

Timber may be sold for equality of exchange.

By an act passed in the succeeding year,[f] incumbents are enabled, with consent of the patron and bishop, to apply the monies to arise by sale of any timber cut and sold from the glebe lands, the timber whereof belongs to such benefice, either for equality of exchange, or towards or in part of equality of exchange, or for the price or purchase money, or towards or in part of the price or purchase money of any house, outbuildings, yards, gardens and appurtenances or lands, or any or either of them, by the last-mentioned act authorised to be taken in exchange or to be purchased, and from and after such exchange or

[c] 55 Geo. 3, c. 147, s. 3.
[d] See 6 Geo. 4, c. 8.
[e] See the details next section.
[f] 56 Geo. 3, c. 52.

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purchase, to be annexed to, and to be and become the parsonage and glebe house and glebe lands of such benefice.

Exchanges of land, in the particular case of unions of benefices, will be found treated of under the head of Unions.[g] United benefices.

Since, however, there might be many cases in which no direct exchange could be effected, power has been given in certain cases, and subject to certain restrictions, to effect what would be equivalent to an exchange in the following manner. Where the residence house, &c. belonging to any benefice is inconveniently situated, or where it is thought advisable to sell and dispose thereof, or where any buildings, &c. belonging to the benefice are so old and ruinous, that it would be inexpedient to expend money in repairing them,[h] the incumbent of the benefice is authorised and empowered, with the consent of patron, ordinary and archbishop, to be signified by their executing the deed of conveyance, to sell such house, &c. with any land contiguous, not exceeding twelve acres, in any such manner as to the patron, ordinary and archbishop may appear best, and to convey the same away accordingly. The purchase money in such a case is to be paid to the governors of Queen Anne's Bounty, to be applied by them in the erection or purchase of some other house and offices or land for the site of a house, with land contiguous, not exceeding twelve acres, such purchase to be approved of by the patron and ordinary, the approval being signified under their hands, and deposited in the registry of the diocese.[i] House of residence, &c. may be sold and another purchased in its stead.

The manner in which the consent of the patron is to be testified in particular cases, is the same as that mentioned in the succeeding section, in the case of purchases and exchanges under 55 Geo. III. c. 147. Consents, how testified.

The governors of Queen Anne's Bounty are also further empowered to lay out and invest such purchase monies in such manner as they may think proper, adding the accumulation of interest to the principal, and so from time to time, so long as the same shall remain in their hands, or until the same, or so much thereof as shall be required, shall have been applied and disposed of by them as before directed; and in case, after the complete execution of the duty or trust imposed on them, or of so much thereof as shall be in their power, any sum of money shall remain in their hands undisposed of, such surplus shall be appointed by them to the benefice on account of which the same shall have been received, and shall be applicable and dis- Money from sale may be invested, &c. until purchase made.

[g] See post. [h] See amendment by 2 & 3 Vict. c. 49, s. 17.
[i] 1 Vict. c. 23, ss. 7, 8, 9.

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posable by them for the benefit of such benefice, in such manner and with such powers of investment, and other powers and authorities in all respects, according to the rules and regulations of the governors for the time being, as if the monies, or the stocks or funds which might be purchased therewith, had been appropriated by the said governors to such benefice, out of the general funds and profits of the said governors or otherwise, for the benefit and augmentation thereof.[k]

Lands annexed to benefices by Queen Anne's Bounty may be sold.

Consents, &c.

Power is also given to sell lands, &c. which have been purchased for or annexed to benefices, for the augmentation thereof, by the governors of Queen Anne's Bounty; but in such cases, the consent of the governors, patron and ordinary to every such sale shall be testified by their respectively executing the deed or other assurance, by which the lands, &c. shall be conveyed or assured; except that in the case of any copyhold land, which shall be conveyed or assured by surrender, such consent may be testified by any writing under the corporate seal, or the hand and seal of each of the consenting parties, which writing shall be produced to the lord or steward of the manor of which the said premises shall be holden, and shall be a sufficient authority to him for accepting from the incumbent and other necessary parties a surrender of the same premises, and such writing shall be entered with the surrender upon the court rolls of the said manor.[l] If the lands, &c. which have been so appropriated or annexed, and which it is thought to be desirable to dispose of, are situate within the parish, the consent of the archbishop is made requisite in addition to the above.[m]

Section 5.

Exceptions from the Statutes of Mortmain.—Lands taken as Glebe, &c. by virtue of certain Statutes.

Besides the powers of exchange spoken of in the last section, several modern statutes have been passed in favour of the church, enabling incumbents, as such, to take and hold, and giving every facility and encouragement to persons disposed to give lands, &c. for the perpetual use of the benefice. Of the extent to which the general revenues of the church may have been augmented by these means we have no accurate means of judging; but it will be re-

[k] 2 & 3 Vict. c. 49, s. 14. [l] Ibid. s. 15. [m] Sect. 16.

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membered, that when lands have once been given by virtue of these statutes, they can never again be alienated without an equivalent received.

Grants by impropriators of tithes; 17 Car. 2, A.D. 1665.

The first provision of this kind which we shall have to mention (for in speaking of a subject somewhat complicated it will be best to keep the chronological order of the statutes) is that by which power is given to the impropriators of tithes to unite the same to the parsonage or vicarage of the chapel where they lie, or to settle the same in trust for the benefit of the parsonage, vicarage, or curacy where the parsonage is impropriate, without any license of mortmain.[n]

The whole of the statute which contains the above provision was by mistake repealed by the statute 1 & 2 Vict. c. 106, but has been since revived by an act passed in the 6 & 7 Vict. c. 37; and the provisions of a statute passed in the 29th year of Charles the Second, for the purpose of confirming particular augmentations that had been then made, would apply to those under the preceding act, so far as giving to the persons in whose favour the augmentation had been made all remedies for recovery of the tithes, &c. granted to them.

Between the times of the passing the first and the last statutes above-mentioned, and in the year 1831, an act was passed, by which the provisions of the first-mentioned act were considerably extended. We have therefore spoken of the power as given generally; but the extending act relates to details which appear to be unnecessary here: it may be sufficient to say, that they are such as would enable the augmentation to be made whether the tithe has been commuted for rent-charge or not. But no benefice may by this means be augmented to above the yearly value of 300*l.*; such annual value to be ascertained in such manner as is hereafter mentioned in the case of endowments made to new churches.[o]

Grants to Queen Anne's Bounty Fund; 2 & 3 Anne, A.D. 1703.

The next provisions to be mentioned are those by which persons are empowered to grant and convey to the Governors of Queen Anne's Bounty Fund. For every person having in his own right any estate or interest in possession, reversion, or contingency, in any lands, is thereby empowered, by deed inrolled in such manner and within such time as is directed by 27 Hen. VIII. c. 16, or by will, to give and grant to and vest in the said corporation, and their successors, all such his estate, interest or property, or any part thereof, towards the augmentation of the maintenance

[n] 17 Car. 2, c. 3, s. 7.
[o] See 1 & 2 Will. 4, c. 45, and post, 3 & 4 Vict. c. 60, s. 4.

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of ministers officiating in a church or chapel where the liturgy and rites of the said church shall be used, and having no settled competent provision belonging to the same; and to be for that purpose applied according to the direction of the benefactor by such deed or will; and in default of such direction, in such manner as by her majesty's letters-patent shall be appointed. And such corporation have full capacity and ability to take for the purposes aforesaid as well from such persons as shall be so charitably disposed to give the same, as from all other persons as shall be willing to sell or alien any manors, lands, tenements, goods or chattels, without any license or writ of ad quod damnum.

General power to give lands or money; 43 Geo. 3, A.D. 1802.

Every person having in his own right any estate or interest in possession, reversion or contingency, of or in lands or tenements, or of property in any goods or chattels, may, by deed inrolled in such manner and time in England as by 27 Hen. VIII. c. 16, and in Ireland as by 10 Edw. II. c. 1, or by will in writing duly executed according to law, such deed or will being duly executed three months before death of grantor or testator, give and vest in any person or body politic or corporate, their heirs and successors respectively, any lands not exceeding five acres,

For what purposes.

or goods and chattels not exceeding 500*l.*, towards erecting, rebuilding, repairing, purchasing, or providing any house for residence for the officiating minister, or any out-buildings, offices, churchyard, or glebe for the same respectively, and to be for those purposes applied according to the terms of the deed or will, the consent of the ordinary being first obtained; and if no such limitation is made in the deed, the gift shall be applied as shall be appointed by the patron and ordinary, with consent of the incumbent; and such grantees, their heirs, &c. may take as well from persons charitably disposed to give the same, as from all others willing to sell them, any lands, tenements or chattels, without license or writ of *ad quod damnum*, notwithstanding the Statute of Mortmain; but these powers shall not extend to persons within age, insane, or femes coverts. Only one such gift or demise shall be made by one person; and where either exceed five acres, or 500*l.* value in goods and chattels, the lord chancellor on petition may order its reduction to that amount, and make further reasonable order in the premises.[p]

Restrictions.

No glebe of more than fifty acres shall be augmented by more than one acre; and any excess therein shall be reduced by the lord chancellor.[q]

[p] 43 Geo. 3, c. 108, ss. 1, 2.

[q] Sect. 3.

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Grant of waste lands; 51 Geo. 3, A.D. 1810.

Every person having the fee simple of a manor may, by deed under his hand and seal inrolled in chancery, with or without such confirmation as the law requires, grant to the minister of any parish church or chapel consecrated for the service of the Church of England and Ireland, not exceeding five acres, parcel of the waste of the manor, and lying within the parish where such church or chapel shall be erected, or within an extra-parochial district in which such church, &c. shall be erected, for glebe on which to erect a residence for the minister, freed from all rights of common.[r]

The next provision of this kind which is to be noticed is that which empowers the conversion into glebe of lands which already belong to the benefice in some other right, such annexations are to be made in the manner and subject to the restrictions following:

Power to annex as glebe manorial lands parcel of the benefice; 55 Geo. 3, A.D. 1814.

Any incumbent of any benefice of or to which any manor is parcel or appurtenant, and as parcel to which any lands or tenements have been usually granted or demised or grantable, by deed indented and registered, with the consent of patron and bishop, testified as presently mentioned, may annex to such benefice as glebe land or parsonage house all or any part of such lands or tenements, whether lying within the local limits of such benefice or not; which after such annexation shall cease to be demisable as before by the incumbent, and shall become the glebe land and parsonage house annexed to such benefice for ever, without license or writ of ad quod damnum; but such annexation shall not annul existing grants or demises thereof.[s]

Power to give parsonage house, &c. in certain cases.

Wherever there is no parsonage or glebe house upon a benefice, or where, there being such a house, the same is too small and inconvenient, or incommodiously situated, any person or persons, or corporation, being owners in fee simple, are authorized and empowered to give, grant, and convey to the parson or incumbent of such benefice, in such manner as will be presently mentioned, any messuage, garden, lands, &c. or any right of way or other easement, whether lying within the local limits of such benefice or not, so that the same may be conveniently situate for actual residence or occupation by the incumbent thereof.

To continue such for ever.

And every such messuage, garden, land, &c. so granted and conveyed shall for ever after become annexed to and be deemed and taken to be the parsonage and glebe house, &c. to all intents and purposes whatsoever, and be holden and enjoyed by such incumbent and his successors accord-

[r] 51 Geo. 3, c. 115, s. 2. [s] 55 Geo. 3, c. 147, s. 6.

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ingly, without any license or writ of ad quod damnum, the Statutes of Mortmain or any other statutes to the contrary notwithstanding.[t]

Disposal of the old house.

After such annexation by gift has been made, the incumbent may, by obtaining such consent as hereafter mentioned, take down and remove the old parsonage or glebe house, if it cannot be better applied to the permanent advantage of the benefice; and may apply the materials, or the produce of them if sold, towards some lasting improvement of the benefice.[u]

Incapacitated persons not empowered.

Infants and lunatics, and femes covert without their husbands, are excepted from the power given; and not authorised by this act to make such gift, grant, or conveyance.

Incumbents empowered to purchase lands for glebe.

It is also by the same act made lawful for the parson or other incumbent for the time being of any benefice, the existing glebe whereof does not exceed five statute acres, with such consent and signified as hereafter mentioned, to purchase any lands not exceeding in the whole twenty statute acres, with the necessary out-buildings thereon, whether being within the limits of such benefice or not: but so as that the same be conveniently situated for building a parsonage or glebe house, or for gardens or glebe thereof, or for any of the said purposes, and for actual residence and occupation by the incumbent thereof, such lands being of freehold or copyhold tenure; which lands so purchased shall for ever after the grant thereof be and become annexed to the glebe of such benefice to all intents and purposes whatsoever, and be holden and enjoyed by such incumbent and his successors accordingly, without any license or writ of ad quod damnum; and such lands or such part of them as before the annexation were of copyhold tenure, shall after such annexation become and be of freehold tenure.[x]

How fund for such purchase may be provided.

This last enactment would have been nugatory, had not some fund been provided by means of which the purchase could be effected, and it is therefore by the next section of the same act enacted, that it shall be lawful for such incumbent for the time being, with such consent, and signified as hereafter mentioned, to borrow, over and besides such sums of money as he would be authorised to borrow under the Gilbert Act,[y] such sum or sums of money as shall be certified upon oath of some experienced surveyor to be the just value of the lands to be purchased, not exceeding two years' clear income and produce of such bene-

[t] Sect. 5. [u] Ibid. [x] Sect. 6. [y] See post.

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fice, after deducting all taxes and outgoings, except the salary to the assistant curate.[a]

Repayment of sum borrowed.

And the repayment of the money so borrowed is to be secured by a mortgage of the tithes, rents, and other emoluments and profits of the benefice, to any person or persons who shall advance such money, by one or more deed or deeds, to be registered as hereafter mentioned, for the term of twenty-five years, or until the principal and interest, and all costs and charges attending the recovery thereof, shall be fully paid off and satisfied. Such mortgage deeds shall bind the incumbent and his successors; and a counterpart executed by the mortgagee is to be kept by the incumbent.[b]

The incumbent for the time being is to pay to the mortgagee or mortgagees yearly, as the same shall become due, or within one month afterwards, as well the interest of the principal money secured by such mortgage, as also the further sum of 5*l.* per cent. of the principal originally advanced. But every such incumbent who does not reside twenty weeks in every year upon such benefice (computing each year from the date of the first or only mortgage deed), is to pay within the same period 10*l.* instead of 5*l.* per cent. of the principal money originally advanced, until the whole of such principal money originally advanced is fully paid off. And every incumbent who, under the provisions before mentioned, is to pay off 5*l.* per cent. only, must produce and deliver to the mortgagee, at the time of payment, a certificate under the hands of two rectors or other officiating ministers of some parishes near adjoining, signifying that he has resided twenty weeks upon the benefice within the year for which such payment became due.[c]

Provisions for enforcing payment.

In default of payment of the principal, interest and costs in such manner as before mentioned, the bishop is empowered to sequester the profits of such benefice until such payment shall be made. And if the principal or interest, or any part thereof, shall be in arrear for forty days next after the yearly day of payment whereon the same shall have become due, the mortgagee or mortgagees, or the executors, administrators, or assigns, may recover the whole or any part thereof that may be unpaid, and the costs incurred in such recovery, by distress and sale, in such manner as landlords are empowered by law to recover rents in arrear.

Payment by successor.

In order that the payment of such principal and interest

[a] Sect. 7. [b] Ibid.

[c] Such provisions appear scarcely necessary since the recent act for enforcing residence.

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may, in case of an avoidance by death or otherwise, be equitably adjusted between the incumbent avoiding such benefice or his representatives and his successor, such payment shall (in case any difference shall arise in settling the proportions thereof) be ascertained by two indifferent persons, one to be named by each party; and in case such nominees shall not be appointed within two calendar months next after such avoidance, or in case they shall not agree within one month after they have been appointed, the same shall be determined by some neighbouring clergyman to be appointed by the bishop, whose determination shall be final and conclusive between the parties.[d]

Governors of Queen Anne's Bounty may lend.

The governors of Queen Anne's Bounty are authorised to lend money for the above purposes, in the same way and under the same provisions as private persons, except that the interest they are to receive for the money lent is not to exceed 4*l.* per cent; and where the clear annual value of a benefice does not exceed 50*l.*, they are authorised to lend any sum not exceeding 100*l.* without interest, the principal only being to be repaid in the manner aforesaid.[e]

So with colleges, &c.

Colleges or halls in the Universities of Oxford or Cambridge, or any other corporate bodies, being owners of the patronage of benefices, may advance any sums of money of which they have the power to dispose, to the incumbent of any such benefice, secured in such manner as before directed, either with or without interest.[f]

Consent necessary to exchange purchases, &c.

In any exchange,[g] purchase, annexation by gift or mortgage under the provisions of this act, the consent of the patron and the bishop to every deed of exchange, conveyance or mortgage, shall, before the same shall be signed and sealed by the incumbent, be signified by the said bishop and patron respectively being made parties to and signing and sealing the said deed, in the presence of two or more credible persons, who by indorsement thereon shall attest the same, and in which attestation it shall be expressed that the same deed was so signed and sealed before the execution thereof by such parson or other incumbent;

In case of peculiars.

but in the case of peculiars, the authority given by the act to the bishop of the diocese is to be exercised by the archbishop or bishop to whom such peculiars belong: with respect to peculiars belonging to other persons or corporations than archbishops or bishops, the authority is to be exercised by the bishop of the diocese within which the peculiar is locally situated.[h]

Power to all

All owners of lands, whether under any legal disability

[d] Sect. 7. [e] Sect. 8; and see post, First Fruits and Tenths.
[f] Sect. 9. [g] See the last section. [h] Sects. 10, 11.

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or not, are empowered to exchange, grant or convey their lands for the purposes before mentioned, provided all the directions of the act in that respect are properly observed. In the case of an exchange, old glebe lands or the parsonage-house so taken by them are to be settled to the same uses as the lands given in exchange were previous to the exchange being made, and all purchase-money received on account of such lands belonging to any corporation, infant, feme covert, lunatic, or person under any legal disability, is to be paid into the bank in the name of the accountant-general of the Court of Chancery, to be invested in the funds in his name, and the dividends to be paid to the persons who would have been entitled to the rents of the lands sold, if the same had not been sold, until the same is laid out in the redemption of the land-tax, or in paying off incumbrances, or in the purchase of other lands to be settled to the same uses.[i] But none of such incapacitated persons are by the act empowered to convey (except by way of exchange) more than five acres.[k]

Owners to sell or convey.

Incapacitated person may only convey five acres.

Wherever any exchange or purchase is about to be made under the authority of the act, three calendar months' previous notice, describing the particulars, extent and situation of the premises respectively to be given or taken in exchange or purchased, is to be given of the intention to make such exchange or purchase, by the insertion thereof, for three successive weeks, in some one and the same county newspaper; and also by fixing it on the door of the church shortly before the commencement of the service on three Sundays successively.[l]

Notice requisite.

Also, whenever any exchange or purchase is about to be made under the authority of the act, a map or maps are in cases of exchange to be made of so much of the glebe lands as will enable the bishop to judge of the expediency of the proposed exchange, &c., and also of the parsonage-house, buildings, or glebe, any part of which it is proposed to exchange, as well as of the other lands, houses, and buildings proposed to be taken in exchange; and in the case of purchase, the same shall be made of the whole of the lands intended to be purchased. And in the case of exchange a valuation shall be made both of the lands to be given and of those to be taken in exchange; and in the case of purchase, a valuation is to be made of the lands intended to be purchased, and such valuation shall include and distinctly specify the value of timber and other trees growing thereon, of rights of common, mines, minerals, &c. and of all other rights and profits belonging to the same.[m]

Details to be observed prior to the exchange, purchase, &c.

[i] Sect. 12. [k] Sect. 13. [l] Sect. 14. [m] Sect. 15.

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The map and the valuation is to be made by the same surveyor, and in either case is to be so made by him on oath, which any justice of the peace is empowered to administer for that purpose.

Commission issued by the bishop.

In all such cases of exchange and purchase, the bishop, after he has received such map or maps and valuation, and if he so far approves of such exchange or purchase, shall issue a commission of inquiry under his hand and seal, directed to such persons as he shall think proper, not being less than six in number, three of whom are to be beneficed clergymen residing in the neighbourhood of the benefice to which the proposed annexation is to be made, and one of whom is to be a barrister of three years' standing at the least, to be named by the senior judge of the last nisi prius commission for the county in which the benefice is situated, or if in Middlesex, to be named by the chief justice of the King's Bench or of the Common Pleas for the time being; or if in Lancaster or Durham, by the chief justice or senior judge of the Common Pleas for those counties palatine respectively. And the return to which commission shall be signed by a majority of the persons named in it, after an actual inspection of the premises, with the map and valuation before them, in which majority it is essential that the three beneficed clergymen, or two of the three beneficed clergymen and the barrister, should be included; and in no case shall any such exchange or purchase be effected until such commission shall have been first issued and returned, and unless the return, made in such manner as directed, shall certify that the exchange or purchase is proper to be made, and will promote the permanent advantage of the benefice.[m]

Patron under disability.

In case the patron of the benefice be an infant, lunatic, idiot, or feme covert, the guardian, committee, or husband of every such patron, may execute the necessary deeds for them, by which execution they shall be bound.

Patronage in the crown.

In cases where the patronage of any such livings is in the crown, if above the yearly value of 20*l.* in the king's books, the consent of the crown as patron to any proceedings under the act is to be signified by the execution of the deeds by the first lord of the treasury; if under 20*l.* then by the execution of the deeds by the lord chancellor; if in right of the Duchy of Lancaster, then by such execution by the chancellor of the duchy.[n]

Deeds, &c. to be deposited with the registrar.

One part of all deeds and instruments made and executed in pursuance of this act with the maps and valu-

[m] Sect. 16; and see also 56 Geo. 3, c. 2, s. 2, and 6 Geo. 4, c. 8, s. 2.
[n] 55 Geo. 3, s. 147, s. 18.

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ations, commissions of inquiry, and return thereto, shall within twelve months after date be entered in the office of the registrar of the diocese wherein the benefice is locally situate; if within a peculiar, then with the registrar thereof for preservation therein, and such registrar shall sign a certificate of deposit either on the same or a separate parchment, which deeds shall be open to inspection at proper hours, and an office copy certified by the registrar shall be evidence thereof in all courts, which he shall grant on request, and 10*s.* shall be paid by him besides any stamp duty for the commission and previous requisites; 5*s.* for depositing the same, and certifying the deposit; 1*s.* for such search, and 6*d.* besides stamp duty for every folio of seventy-two words of such office copy so certified.[o]

The next set of provisions for the grant of lands as glebe are contained in some of what are usually called the Church Building Acts.

Grants to the church building commissioners for house of residence, 58 Geo. III. A. D. 1817.

The commissioners appointed for carrying into execution the act passed in the fifty-eighth year of George III. for promoting the building of additional churches in populous parishes, and which commissioners have been by various acts of parliament continued up to the present time, were empowered to accept and take from any person willing to give the same any house, garden and appurtenances, not exceeding ten acres in the whole, for the residence of the spiritual person serving churches or chapels built under the provisions of the Church Building Acts; or any lands not exceeding the said ten acres in quantity, for erecting such buildings and appurtenances, and making such garden; and immediately upon the consecration of such church or chapel, the same to become and be the house and glebe belonging to such church or chapel, and to vest in the incumbent for the time being as such.[p]

The commissioners of woods and forests, with the consent of the first lord of the treasury and the other lords, or any three of them, in writing, or his majesty, by any grant signed by the chancellor of the Duchy of Lancaster, or the Duke of Cornwall, by any grant signed by the chancellor of the Duchy of Cornwall,[q] or any body politic, corporate or collegiate, or corporation aggregate or sole, may grant any such house or appurtenances and garden, for the resi-

[o] Sect. 19.

[p] 58 Geo. 3, c. 45, s. 33.

[q] Some doubt was expressed as to the power given in the case of lands of the Duchy of Cornwall, which was consequently removed by 1 & 2 Vict. c. 107, s. 8.

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dence of the spiritual person who may serve the church or chapel.[r]

Although persons under any legal disability were enabled by this statute to convey lands for the site of churches or chapels, they were not enabled to convey any house for residence of the incumbent on any lands for glebe, but such power was limited to any person willing to give the same and to his majesty, in such right as before mentioned. But now this has been altered by an act passed in the present reign; and all such bodies politic and persons under disability as were by the former act empowered to convey lands for the site of a church or chapel, are now empowered to convey lands by sale and exchange only, and only to the extent of five acres, for the site of a house of residence for any incumbent;[s] persons not under any such disability being still authorised to give and the commissioners to receive ten acres.[t]

The next provision relates to the purchase of lands *by or under the direction of the bishop* for benefices above a certain value, and is to the following effect:

Purchase of glebe by bishop, 1 & 2 Vict. A.D. 1838.

Where new buildings are necessary to be provided for the residence of the incumbent of any benefice exceeding in value 100*l.* a year, and avoided after August 14, 1838, and where such new buildings cannot be conveniently erected on the glebe of such benefice, it shall be lawful for the bishop to contract, or to authorise the person nominated by him[u] to contract, for the absolute purchase of any house in a situation convenient for the residence of the incumbent of such benefice; and also to contract for any land adjoining to such house, or to contract for any land upon which a fit house of residence can be conveniently built; and to raise the purchase-money for such house or land by mortgage of the glebe, tithes, rents, and other profits and emoluments arising from such benefice, in the same manner as will be found mentioned in our next chapter with respect to mortgages of benefices under the same act. But no greater sum than four years' net income of the benefice shall be charged upon it by such mortgage.[x]

To be conveyed to patron of the benefice.

The buildings and lands thus purchased are to be conveyed to the patron of the benefice for the sole use and

[r] Sect. 34. [s] 1 & 2 Vict. c. 107, s. 9.

[t] Such at least appears to be the proper interpretation of the clause, for in any other point of view it would be a limitation rather than extension of the power, whereas the spirit of the whole act aims at an extension.

[u] See post, for this nomination. [x] 1 & 2 Vict. c. 106, s. 70.

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benefit of the incumbent for the time being, and shall be annexed to such benefice, and go with the same in succession. The purchase-deeds are to be in a particular form specified by the act, confirmed in writing by the bishop, and registered as directed with respect to the other mortgage deeds under the same act.[y]

Effect of this last provision.

The effect of this last provision is very important. The bishop is the party who is empowered to do, after the future avoidance of benefices, all that which the incumbent was empowered to do under those provisions of the 55th Geo. III., which in the present chapter have been already fully explained. And since this is the case, it would seem that it would have been far better, and would have obviated some confusion, if all those former provisions (so far as relates to any benefice in future vacant) had been repealed. It appears quite unnecessary that such a power should exist both in the bishop and the incumbent, especially as the incumbent in any case can only act with the bishop's consent; and according to the spirit of recent legislation on these matters, it seems best that such proceedings should originate with and be conducted under the direct authority of the bishop.

Endowment by the future patron of new churches.

Where new churches are built under the statute 1 & 2 Will. IV. c. 38, or under 1 & 2 Vict. c. 107, (which are the statutes providing for giving the right of patronage to such persons as shall endow a new church with a sum of 1000*l.*) it is made lawful for such persons to make the endowment by giving 40*l.* per annum arising out of lands, &c. instead of the gift of 1000*l.* And the trustees of such persons or church building commissioners are empowered to take and hold such annual sum so secured on lands, &c.[z] And such trustees are further empowered to assign and transfer any such endowments to the governors of Queen Anne's Bounty, to be held by them on the same trusts, which endowments such governors are empowered, if they agree so to do, to accept.[a]

Endowments in land to new churches generally, 3 & 4 Vict. c. p. 1840.

The provisions of the older Church Building Acts, which allow endowments to be made in lands, have here been very slightly mentioned, as such endowments are permitted with much less restriction by the provisions of the last statute passed for the purpose of amending all the former acts upon this subject; for now in any case where by virtue of any of those acts an endowment, grant or conveyance, consisting of or arising out of lands, &c., or consisting of money to be laid out in lands or other here-

[y] Sect. 71; and see the next Chapter.
[z] 1 & 2 Will. 4, c. 37, s. 2. [a] 2 & 3 Vict. c. 49, s. 12.

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ditaments, is authorised to be made for the purpose of a site for any church or chapel, or churchyard, or parsonage house, or glebe, or for the use or benefit of any church or chapel, or of the incumbent or minister thereof, or for the repairs thereof, such endowment, grant or conveyance, whether made before or after the passing of the amending act, shall be good and valid, without any license or writ of *ad quod damnum*, the statutes of mortmain, or any other statute or law to the contrary notwithstanding.[b] But this does not authorise an endowment of more than the clear annual value of 300*l.*; and if any endowment is made to exceed that value, the mortmain acts are at once to apply.[c]

Not exceeding 300*l.* per annum.

How value to be ascertained.

It became necessary therefore to make some provision for ascertaining such clear annual value, for which purpose it is enacted that the church building commissioners, or the bishop of the diocese, may cause such clear annual value to be determined and ascertained by any two persons whom they or he shall appoint for that purpose, by writing under the common seal of the commissioners, or by writing under the hand of the bishop, which writing is directed to be afterwards annexed to the instrument by which such endowment shall be effected; and a certificate of such clear annual value, written and indorsed on the instrument by which such endowment shall be effected, and signed by such persons as aforesaid, shall, for the purposes of the act, be conclusive evidence of such clear annual value.[d]

Additional endowments to these churches or their ministers may at any time be made, so long as the total clear annual value is not thereby increased to above 300*l.*

Church Endowment Act, 6 & 7 Vict. A. D. 1843.

Finally, by the recent act, commonly called the Church Endowment Act, which provides for the creation of new parishes for ecclesiastical purposes, powers similar to those conferred upon the governors of Queen Anne's Bounty, enabling them to hold lands in trust for the benefices augmented by them, are conferred upon the ecclesiastical commissioners for holding lands in trust for the incumbent of the new parishes created by that act: for every person or body corporate, having in his or their own right any estate or interest in possession, reversion or contingency, in any lands, tithes, tenements or other hereditaments, shall have full power, license and authority, by deed enrolled in such manner and within such time as is directed by the statute 27th Hen. VIII. c. 16, in the case of any lands, tithes, tenements or other hereditaments, or without deed in the case of goods or chattels, or by his or their

Ecclesiastical commissioners may hold lands for certain purposes.

[b] 3 & 4 Vict. c. 60, s. 2. [c] Ibid. s. 3. [d] Sect. 4.

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testament in writing, duly executed according to law, to give and grant to and vest in the ecclesiastical commissioners all such their estate, interest or property in such lands, &c., or any part or parts thereof, for and towards the endowment or augmentation of the income of such ministers, or for or towards providing any church or chapel for the purposes and subject to the provisions of the act, and to be for such purposes respectively applied, according to the will or deed of such benefactors respectively, as by such deed, &c. may be expressed; or in the case of no deed or instrument, as may in some other manner be directed, and in default of such expression or direction, then in such manner as shall be directed by the commissioners; and such commissioners shall have full capacity and ability to purchase, receive, take, hold and enjoy, for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons who shall be willing to sell or alien any lands, tithes, tenements or other hereditaments, goods or chattels, without any license or writ of *ad quod damnum*, the statute of mortmain, or any other statute or law to the contrary notwithstanding.[d]

General rules from the preceding statutes.

In the preceding sketch of the statutes, which make exceptions from the general effect of the mortmain acts in favour of persons ecclesiastical, we have omitted the several permissions given for granting land for sites of churches and churchyards, which do not appear to belong to this place. The multiplication of statutes, providing in different manners for purposes not very essentially different, has caused many complaints to be made of their obscurity. The result, however, of the preceding statutes, so far as our present purpose is concerned, appears sufficiently simple and intelligible. The following rules may be deduced from them.

1. No person is by these acts empowered to make any indiscriminate grant of lands in favour of any incumbent or of any benefice he may select. The mortmain acts would prevent him in all such cases generally.

2. But if any person is disposed to make such general grant, there are two corporations, namely, "The Governors of Queen's Anne's Bounty," and "The Ecclesiastical Commissioners," to whom they may make the grant, either specifying particular purposes or not, who are empowered to accept the benefaction, and by whom it will be rightly applied.

3. In the case of old parishes, and whether there exists

[d] 6 & 7 Vict. c. 37, s. 22.

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glebe land and a good house of residence or not, impropriators of tithes may reannex the same to the benefice, so long as the annual value is not made to exceed 300*l.*

4. In the same cases as in the last rule incumbents, to whom in right of their benefice manorial lands belong, may annex them, or any part of them, to the benefice as glebe.

5. In the case of old parishes, where there is insufficient house of residence, and less than fifty acres of glebe lands, persons are empowered to grant not exceeding five acres for glebe; but the glebe must not be so made to exceed fifty-one acres altogether.

6. In the same cases as in last rule lords of manors may grant not exceeding five acres of the waste.

7. Where there is no house of residence, or an inconvenient one, any person, not under legal disability, may give one to the benefice, with gardens, appurtenances, &c.

8. Where the existing glebe does not exceed five acres, the incumbent may purchase for glebe not exceeding twenty acres, money for which purchase may be raised on mortgage of the benefice, certain conditions and restrictions being observed.

9. Where a benefice exceeds 100*l.* per annum, and becomes void after 1838, and new buildings are necessary for residence, the bishop may purchase for the benefice a house or land for building; money for which may be raised as in rule 8.

10. In the case of new churches built under the church building acts, persons not under legal disability may give any lands, &c. as endowment in such manner as they think fit, so long as the whole amount of the endowment does not exceed in value 300*l.* per annum.

11. In the same case as in last rule, persons may give endowment in or out of lands, vesting the same in private trustees, in the governors of Queen Anne's Bounty, or in the ecclesiastical commissioners as their trustees; and private trustees may transfer such trust to the governors of Queen Anne's Bounty.

Encroachments on the waste.

There is one other case in which it is possible that lands may be acquired as glebe, notwithstanding the statutes of mortmain, a case more frequent now than may be commonly supposed; for it may very frequently have happened, especially since the building of parsonage houses has become much more common than heretofore, that waste lands or common or old roads may have been inclosed, or ponds filled up by the incumbent, converted into yard or garden, and occupied as such with the parsonage house;

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and in some counties, where waste lands in the villages is very frequent, such conversion may have been of considerable extent. In cases where the incumbent enclosing such lands has acquired a title to them by lapse of time, it may be doubtful whether they would devolve upon his heir, or would pass to his successors, as having been considered part and parcel of and appurtenant to the parsonage. But as the statutes of mortmain would operate to prevent lands from becoming the property of an ecclesiastical corporation, without some special enactment, it is presumed that lands so acquired would pass to the heir of the incumbent, to the great inconvenience of his successor.

Section 6.

Houses of Residence upon Glebe Lands, and building new Houses under the Gilbert Act, and other Acts.

Origin of parsonage houses.

Having in the last section seen in what manner and under what restrictions lands may be acquired to the use of an incumbent, and become glebe, we come now to speak more particularly of the houses erected upon such lands for the residence of the incumbent therein.[e] At the original endowment of churches, it is probable that in many cases some house of residence was given with the glebe land for the accommodation of a residing minister, but that this was by no means universal.

In the case of those benefices which lay contiguous to some abbey or monastery, and where the monks, appropriating the revenues, provided for the performance of the ecclesiastical duties by some member of their own bodies, the houses of residence would of course soon become dilapidated, and in many cases be removed. In many other cases, also, the incumbent, having but a life estate, would only take care that the house was kept in such repair as by the law of dilapidations he was compelled to leave it in at his decease, while the change of times, and of the habits of living, required a home larger and of a different description for the proper accommodation of the incumbent.

Recent alterations in style of houses, &c.

Consequently, until a very recent period, the houses for the residence of ministers throughout the country were mean, inconvenient and ill-adapted for their purpose, when the subject engaged the attention of the legislature; and

[e] The present section relates to houses built upon lands which are already glebe, a subject, therefore, quite distinct from the preceding.

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the present law on this subject is almost entirely regulated by statute.

In speaking of the mode in which new glebe lands may be acquired, we have already mentioned some of the methods in which houses of residence may be provided; as where persons who are willing to give and grant houses with the land are enabled under certain limitations or restrictions so to do; or where the incumbent is enabled, with the consent of the patron and ordinary, to sell or exchange the glebe or house of residence for the purpose of obtaining some more convenient house; or where he is empowered to purchase land for the purpose of building on it.[f]

New houses built on the old glebe.

We now come to the methods by which an incumbent is enabled to erect a suitable house upon glebe already belonging to the benefice, without personally incurring more than a just proportion of the cost.

The Gilbert Act.

The first act for this purpose, commonly called "The Gilbert Act," was passed in 1776,[g] but some of its provisions have subsequently been extended and altered by acts passed in the present reign; as there are still, however, some cases which may be entirely regulated by the first act, and every case is in a great measure dependent upon the provisions contained in it, it will be best to state the substance of it.

Proceedings under.

Whenever the parson, vicar or other incumbent of any benefice, being under the jurisdiction of the bishop or other ecclesiastical ordinary, whereon there is no house, or one so mean or ruinous that one year's net income and produce of such living would be insufficient to put it in repair, shall think fit to apply for the assistance of that act, he must first procure from some skilful workman or surveyor a certificate containing a statement of the condition of the building on his glebe, and of the value of the timber and other materials thereon fit to be employed in such building or repairs or to be sold, and also a plan and estimate of the work proposed to be done; which statement and estimate must be verified upon oath before some magistrate, or ordinary or extraordinary master in chancery; and he must lay the same, together with a particular account in writing, signed by him and verified upon oath taken in the same manner, of the annual profits of the living, before the ordinary and patrons of the living, and obtain their consent to such proposed new buildings or repairs in writing, in the particular form prescribed by the act; and having complied with these requisitions he may borrow and take

Money may be borrowed for building.

[f] See ante, preceding section.

[g] 17 Geo. 3, c. 53.

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up at interest such sum of money as the said estimate shall amount to, after deducting the value of timber and other materials which may be thought proper to be sold; such sum not to exceed two years net income of such living, after deducting all rents, stipends, taxes and other outgoings, except only the salary to the assistant curate, where such curate is necessary.

As a security for the money so to be borrowed, he is empowered to mortgage all the emoluments of the living to the persons who advance the same, by one or more deed or deeds, for the term of twenty-five years, until such money, with interest for the same, and the costs attending the recovery thereof, shall be paid.

The mortgage deeds are to be in the particular form prescribed by the act, and will bind every succeeding incumbent of the living, until the principal and interest are paid, as completely as if he had himself executed them.

Mortgages to be registered.

Every mortgagee is to execute a counterpart of every such mortgage, to be kept by the incumbent for the time being, and a copy of every such deed is to be registered in the office of the registrar of the bishop of the diocese where the parish lies, or other ordinary having episcopal jurisdiction therein, after having first been examined by him with the original; the fee for registering which is not to exceed five shillings. Such deed is to be referred to upon all necessary occasions; and the same, or a copy of it, certified under the hand of the registrar, to be allowed as legal evidence in case the mortgage deed should be lost or destroyed; the fee for inspecting the same at any time to be one shilling.

On failure of payment of principal and interest, according to the directions of the act, for forty days after the same become due, the mortgagee may recover the same, together with costs and expenses, by distraining in the usual manner.

To be paid to an appointee.

The money borrowed under these provisions is to be paid to a person appointed to receive and apply the same by the ordinary, patron and incumbent. Such appointment to be by writing, and in a particular form directed by the act; and the appointee to give a bond to the ordinary, conditioned for the duly applying the same according to the act. His receipt to be a sufficient discharge to the persons advancing the money; and he is the proper party to enter into contracts for such buildings or repairs as are approved of by the patron, ordinary and incumbent, and specified in writing on parchment, to be signed by them according to a particular form prescribed by the act.

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Duties, &c. of the appointee.

Such appointee is further to have the care of the execution of such contracts, and of the payment of the money, and is to take the proper receipts; and when the buildings are completed and the money paid, he is to pass his accounts before the ordinary, patron and incumbent; and when these have been allowed by them in writing according to a form prescribed by the act, such allowance is a full discharge to the appointee in respect of them.

If any balance remain in the hands of the appointee it may be laid out in any lasting improvement in building on the glebe, or in the discharge of so much of the debt. This is to be at the discretion of the ordinary, patron and incumbent, or of the ordinary and either one of the others, by order signed by them in the form prescribed by the act. Of all which further disbursements an account is to be kept in the same manner as before; and which accounts, when made out and allowed, are to be deposited, together with the vouchers, with the registrar; and incumbents for the time being shall have a right to inspect the same on paying a fee of one shilling for every such inspection.

The patron, ordinary and incumbent, or the ordinary with either of the others, may make such allowance to their appointee as they may think fit, not exceeding 5*l.* per cent.

Repayment of principal.

The incumbent for the time being of any living thus mortgaged is to pay yearly, as the same becomes due, or within one month after, over and besides the interest of the principal money, or of so much thereof as then remains due, 5*l.* per cent. of the principal money originally advanced upon such mortgage, until the whole of such principal money be discharged.

And a provision was also made by this section for the payment of 10*l.* per cent. of the principal money by non-resident incumbents; but this provision has been altogether repealed, and the cases to which it might be applicable must now be so very rare, and must so soon cease altogether, that it will be unnecessary to mention it further.

Buildings to be insured against fire.

As soon as the buildings are completed, the incumbent is to insure them against fire in one of the public offices in London or Westminster, at such sum as agreed on by the patron, ordinary and incumbent; and should such insurance not be properly kept up, the ordinary is empowered to sequester the profits of the living until the proper payment is made.

In some cases the ordinary may take these proceedings.

If the incumbent of any living worth more than 100*l.* per annum, where there is no house of residence, or one unfit for the purpose, should neglect to avail himself of

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the provisions of the act, and is non-resident in the parish for twenty weeks in any year, and does not think fit to lay out one year's income of the living where the same would be sufficient to put the premises in repair, the ordinary is empowered, with consent of the patron, to procure such plan, estimate and certificate; and in the course of the next year to proceed in such execution of the purposes of the act as directed in the first section, which shall in all respects be binding on the incumbent and his successors, in the same way as if done with consent of the incumbent.[h]

Duties of the ordinary in all cases.

In all cases the ordinary, before signifying his consent to the mortgage, shall cause inquiry to be made and certified to him by the archdeacon, chancellor of the diocese, or other proper person living in or near the benefice, according to a form prescribed by the act, of the state of the buildings at the time the incumbent entered upon the benefice, how long he has lived there, what money he has received or is to receive for dilapidations, and how it has been laid out.

In certain cases part to be paid by incumbent.

And if it appear that the incumbent has wilfully suffered such buildings to get out of repair, the same is to be certified to the ordinary, together with the amount of damage thereby sustained; and such incumbent, if required by the ordinary, shall pay the same to the appointee, under the fourth section of the act, towards defraying the expenses of building or repairs, before the ordinary gives his consent. And all sums received for dilapidations from the representatives of any former incumbent, and not already expended in repairs, as well as any sums to be received, as soon as received, shall be applied in part payment under the estimate made according to section 1; or if mortgage money has been paid off, then to be expended in some additional improvement on the glebe, to be approved by ordinary, patron and incumbent; and in the meantime, or if no such improvements are required, the interest to be paid to the incumbent for the time being. It does not, however, appear likely that the latter part of this section would ever be practically useful.

The tenth section of this act provided for the purchase of a new house, more conveniently situate upon land not being already glebe, and the eleventh section for the sale of lands already glebe, to pay for new lands; but as we have already seen, such a transaction is now provided for in a more general manner by recent statutes, according to the provisions of which all such exchanges would now be

[h] See post, the entire alteration in these matters by 1 & 2 Vict. c. 106. ss. 62, 63.

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made, it would therefore be useless to explain any further the provisions of these two sections.[i]

Money may be borrowed from Queen Anne's Bounty.

The twelfth section of this act is very important, and the source therein pointed out from which the money may be borrowed for the purposes of the act has in a great measure superseded every other. By this section the governors of Queen Anne's Bounty, a full account of which fund will be found in another chapter,[k] are authorised to advance and lend any sum not exceeding 100*l.* for promoting the several purposes of the act with respect to any livings which do not exceed the clear annual value of 50*l.*; and such mortgage as before directed is to be made for securing repayment of the principal, but no interest is to be paid in such case. In cases where the annual value of a living exceeds 50*l.* the governors are empowered to advance for the purposes of the act any sum not exceeding two years' income of such living, upon such mortgage and security as before mentioned, and subject to the several regulations of the act; and the interest to be received in such cases is not to exceed 4*l.* per annum.

Colleges, &c. being patrons, may lend.

Colleges in Oxford and Cambridge, and other corporate bodies being patrons of any such benefice, are authorised to lend for the purposes of the act, and upon the security mentioned, any sums of money which they may have the power of disposing of, without taking any interest, but in the same manner as may be done by the governors of Queen Anne's Bounty in the case of livings under 50*l.* per annum.

No deed or other writing under the authority of this act is charged with any stamp duty or fee of office, except as is mentioned in the act.

Provisions for particular cases.

The remaining sections of this act apply to particular cases only. In case of a patron under any disability, the guardian, committee, or husband, as the case may be, is empowered to act for them.

If the ordinary should be a body corporate aggregate, every act required to be done by the ordinary shall be done under the seal of such body.

If the incumbent of any chapelry or perpetual curacy shall be nominated by the rector or vicar of the parish wherein the same is situated, the consent of such rector or vicar, in addition to that of the patron of such rectory, is made necessary.

Patronage in the crown.

Where the patronage of any such benefice is in the crown, if the annual value exceeds 20*l.* in the king's books,

[i] See ante, the two preceding sections.
[k] See post, chapter on First-fruits and Tenths.

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the required consent is to be given by the first lord of the treasury; if under 20*l.*, by the lord chancellor; if in the patronage of the crown in right of the Duchy of Lancaster, then by the chancellor of the duchy, according to the form prescribed by the act; and where any deed is by the act directed to be executed by the patron, ordinary and incumbent, it shall in these cases be valid if executed by the ordinary and incumbent only, after consent obtained from the first lord of the treasury, the lord chancellor, or chancellor of the Duchy of Lancaster, as the case may be, provided such consent be registered at the register office aforesaid.

Recent statutes.

From the time of the passing of the act last mentioned, no important alteration in the law took place until 1838, the 1st and 2nd years of her present Majesty; all mortgages of benefices therefore made between those periods are and will be entirely regulated by the provisions of the first-named act, except in the particulars hereinafter especially mentioned.

The provisions of the first act[1] of that year, however, need be very briefly stated only, since a more full and comprehensive act, to which we shall presently refer, was passed afterwards in the same session, and within three months of the other; for it has unfortunately happened here as in the case of the church building acts, that enactments for the same purposes have been multiplied without any apparent utility, and that much has been specifically re-enacted which might have been accomplished by reference to former acts; so that it becomes a difficult matter, especially for those for whose use they are principally designed, to know which of the provisions of these statutes are practically repealed, or by which their own particular case is to be regulated.

Extension of the provisions of the Gilbert Act.

By this act of the 1 & 2 Vict. c. 23, it is made lawful for any incumbent to take up at interest, for the purposes of the act of 17 Geo. III. before mentioned, and also for the purpose of buying or procuring a proper site for a house and other necessary buildings, or for either of such purposes, any sum or sums of money not exceeding three years' net income of such benefice; as a security for the repayment of which he is enabled to mortgage the emoluments of his benefice for thirty-five years, or until the money is paid. And from and after the expiration of the first year of this term, (in which first year no part of the principal sum to be borrowed is repayable,) the incumbent shall every year, computing such year from the day of the

[1] 1 Vict. c. 23.

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date of the mortgage, pay to the mortgagee one-thirtieth part of the principal sum borrowed, with interest for so much as remains due, until the whole is paid off. In other respects, as to the manner of the payment, the provisions of the first act, and the forms there prescribed, are to be applied. The important alterations, therefore, which are introduced by this section are,

1. The power to purchase a site for building with the money so taken up.

2. The power to take up the amount of three years' income instead of two.

3. The exemption from repayment of any part of the principal in the first year.

4. The extension of the time of repayment from twenty-five years to thirty-five.

5. The repayment by thirtieth parts, instead of by twentieth parts or 5 per cent.

The repeal of that provision in the first act, which compelled a non-resident incumbent to repay by tenth parts or 10*l.* per cent., to which we have before alluded, is effected by the second section of this act as to all mortgages made subsequently to it.

Alteration in mortgages to Queen Anne's Bounty already existing under the Gilbert Act.

The third section of the act is that to which we have alluded as making an alteration in the cases of mortgages effected prior to it, and which were in existence at the time of its passing; for it is thereby enacted, that for the future as to every mortgage which has been made to the governors of Queen Anne's Bounty by any bishop under the powers of any act specially enabling him, whereby a greater yearly instalment than one-thirtieth part of the principal sum is stipulated to be paid, or by the incumbent of any benefice by virtue of the 17 Geo. III. c. 53, the instalment of the principal sum to be repaid annually by them shall be one-thirtieth of the principal sum originally advanced, instead of the yearly instalment in the mortgage stipulated to be paid; such substituted instalment to commence in each case on the day when the next yearly instalment by virtue of such mortgage shall become due; and the mortgages already made to the governors are in these cases to remain in force until the whole principal sum has been repaid, in exactly the same manner as if they had been in the first instances expressed to have been made for the longer term.[m]

The power given by the Gilbert Act to borrow from Queen Anne's Bounty and from colleges, &c. remains the same under this act, the extended provisions of the first

[m] Sect. 3.

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section being applicable to such cases; but there is no provision which directs colleges, &c. to make any alteration in the annual receipts of the money already lent by them upon mortgages actually in existence.[n]

Old houses may be converted to farm buildings, &c.

When any existing house is unfit for the residence of the incumbent, and incapable of being so repaired and enlarged as to make it fit for his residence, and it shall be certified to the bishop by some competent architect or surveyor that it will be advantageous to the benefice that such house should be suffered to remain, the incumbent, having obtained the consent in writing of the bishop, which consent must be registered in the registry of the bishop, may allow the house to stand as a dwelling-house, or convert it into farming buildings for the use of the occupiers of the glebe lands; and after a new house of residence has been built to the satisfaction of the bishop, the old house shall be thenceforth converted to the purposes aforesaid, and the new house taken to be the residence house of the benefice.[o]

We have already had occasion to refer to some of the remaining clauses of this act in speaking of the sale and exchange of glebe lands; the other clauses are similar to those of 17 Geo. III. c. 53, the powers, provisions, &c. of which are extended and made applicable *mutatis mutandis* to mortgages made in pursuance of this act.

Mode of proceeding in mortgages of benefices becoming vacant after August 1838.

We now come to speak of that part of the more full and important act[p] passed subsequently in the same session, by which provision is made for these purposes.

By the 62d section of that act the bishop of the diocese, upon the avoidance of any benefice, is required to issue a commission to four beneficed clergymen of his diocese, or if the benefice be within his peculiar jurisdiction, but locally situate in another diocese, then to four beneficed clergymen of such other diocese, one of whom shall be the rural dean (if any) of the rural deanery or district wherein such benefice shall be situate, directing them to inquire whether there is a fit house of residence within such benefice, and what are the annual profits of such benefice; and if the clear annual profits of such benefice exceed 100*l.*, whether a fit house of residence can be conveniently provided on the glebe of such benefice or otherwise; and if the commissioners, or any three of them, shall report in writing under their hands to the bishop that there is no fit house of residence within such benefice, and that the clear annual profits of such benefice exceed 100*l.*, and that a fit house of residence can be conveni-

[n] Sects. 4 and 5. [o] Sect. 6. [p] 1 & 2 Vict. c. 106.

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ently provided on the glebe of such benefice, or on any land which can be conveniently procured for the site of such house of residence, the bishop is required to procure from some skilful and experienced workman or surveyor a certificate containing a statement of the condition of the buildings (if any), and of the value of the timber and other materials (if any) thereupon, fit to be employed in building or repairing, or to be sold; and also a plan or estimate of the work fit and proper to be done for building or repairing such house of residence, with all necessary and convenient offices; and thereupon, by mortgage of the glebe, tithes, rents, rent-charges and other profits and emoluments of such benefice, to raise such sums as the said estimate shall amount to, after deducting the value of any timber or other materials which may be thought proper to be sold, *not exceeding four years' net income* and produce of such benefice, after deducting all outgoings (except only the salary of the assistant curate, where such a curate is necessary), which mortgage shall be made to the persons who shall advance the money so to be levied and raised for the term of thirty-five years, or until the money so to be raised, with interest for the same, and such costs and charges as may attend the recovery thereof, shall be fully paid and satisfied; and the same mortgage shall be made by one or more deed or deeds in the form or to the effect for that purpose contained in a particular form prescribed by the act, and shall bind the incumbent of such benefice for the time being, and his successors, until the principal and interest, costs and charges, shall be fully paid off and satisfied; and every incumbent for the time being is made liable to the payment of so much of the principal, interest and costs as shall become payable during the time he shall be such incumbent; and every such incumbent and his representatives shall be respectively liable to the proportion of the payments for the year which shall be growing at the time of the death of such incumbent or avoidance of such benefice; which said principal, interest and costs, and the proportion of payment growing at the time of the death of such incumbent or of such avoidance, shall and may be recovered by action of debt in any court of record.[q]

The bishop shall cause to be transmitted to the patron and the incumbent (if any) of such benefice copies of the report so to be made by such commissioners, and of the plan, estimate and certificate so to be made by such workman or surveyor, two calendar months at the least before

[q] 1 & 2 Vict. c. 106, s. 62.

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making any such mortgage; and in case the patron and the incumbent, or either of them, shall object to the proposed site for a residence, or to the proposed plan for erecting or repairing such residence, or the amount proposed to be raised, and shall deliver such objections in writing to the bishop before the expiration of such period of two calendar months, the bishop shall have full power to direct that the plan proposed to be carried into effect shall be altered or modified in such manner as he may think fit. And if the bishop shall, after receiving the report to be made by such commissioners, be of opinion that it is not expedient under the special circumstances of any such benefice, to levy and raise any sum or sums of money by mortgage, or otherwise to take measures for providing a fit house of residence for such benefice, he shall state in detail such special circumstances, and the grounds of his opinion, in the next annual return made by him to her majesty in council.[r]

Alterations made by the above enactments.

Increased power of the bishops.

The first important alteration to be remarked upon, as introduced by these sections, is the very extensive power conferred by them upon the bishop. Previous to this enactment, although the consent of the bishop was made necessary to proceeding under the 17 Geo. III. c. 53, yet his positive interference was restricted to cases where the incumbent was non-resident on his benefice, and refused to avail himself of the provisions of that act; nor even in that case was he empowered to act without the consent of the patron of the benefice.

By this enactment, however, the proceedings are to be initiated by the bishop; and when the report of his commission is returned to him, he is to be sole judge whether or not it is fitting that its recommendations shall be carried into effect; and the objections of the patron or incumbent, or of both of them, are only, as it appears, to be attended to so far as the bishop may think fit.

Requisition of section 62 too general.

The enactment of this 62d section appears to have been too general by some mistake; for if it were strictly complied with, the bishop would be required to issue this commission whenever and as often as any benefice under his control became vacant, whether the house of residence thereon was good or bad, or although it had recently been erected; and even in the case of a benefice as to which a commission has once issued, it would be necessary for the bishop to direct another as soon as the benefice was again vacant. The general practice, therefore, in the different dioceses has been, and, it is believed, continues to be, to

[r] Sect. 63.

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treat the general directions of this section as a mistake, and not to issue the commission on the avoidance of those benefices whereon the bishop has sufficient reasons for knowing that a fit and proper house of residence exists.[1]

Alteration in the amount to be raised.

The other important alteration introduced by these sections is in the amount of the money authorised to be raised; which having been by the 17 Geo. III. c. 53, fixed at two years' income of the living, and by 1 & 2 Vict. c. 23, extended to three years' income, is now fixed at *four* years' income; and it may be instructive as showing the altered style and character of the glebe houses in this country, and possibly also the altered style of living of their occupiers, that it has now been thought advisable and expedient to provide for the erecting of houses, so as to allow them to be of double value as compared with those erected between A. D. 1777 and 1838.

Alteration in certain details.

It would be quite unnecessary to repeat the enactments by which the details of transactions of this nature, and under this statute, are to be regulated, as they differ from those to be observed in accordance with the act 17 Geo. III. c. 53, and which we have already fully mentioned in the following particulars only.

The copy of the deed of mortgage directed by the former act "to be registered in the office of the registrar of the diocese where the parish lies, or other ordinary having episcopal jurisdiction therein," is by this act directed to be registered in the office of the registrar of the bishop of the diocese.

Among the expenses directed by the latter act to be paid out of the fund by the bishop's nominee, in addition to all those directed to be paid by the former act, are the expenses of preparing the mortgage deed and incident thereto, and of making such certificate, plan and estimate, and copies thereof.

Details in which there is no alterations.

All the directions as to the contracts of and by the nominee, and as to the balance remaining in his hands;—his passing his accounts; the executing counterpart of the mortgage; the remedies in default of payment by incumbent; the continuing charge upon successors; insurance against fire; apportionment in case of death or avoidance of the living; application of money received for dilapidations; the authority to governors of Queen Anne's Bounty to lend money at 4*l. per cent.* interest—to colleges in Oxford and Cambridge and other corporate bodies, to lend money without interest; allowance to the nominee of the

[1] Communicated to the author as the usual practice by the bishop's officers.

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bishop,—are precisely the same as those of the first-mentioned act, which we have already explained and analyzed, and might probably have been more simply provided for by a reference to that act.

In what cases the first acts are still in force.

We have now gone through the several statutes providing for the erection of suitable and convenient houses of residence on *lands which are already glebe.*

It remains to be particularly observed, that the last of these statutes does not operate as a repeal of the former ones; and, moreover, that it is altogether inapplicable to the case of any living, until there has been an avoidance since the passing of the act.

It is clear, therefore, that any incumbent instituted prior to that time, August 14th, 1838, who should wish to avail himself of these provisions for building a new house of residence, must proceed according to the directions of the 17 Geo. III. c. 53, as altered by 1 & 2 Vict. c. 23. In such a case, consequently, the extent of the amount to be taken up at interest would be three and not four years' value of the income of the living, and the details of his proceeding would be regulated in all respects by the provisions of the former acts, which should be adhered to even in those cases where the latter act has introduced any variance.

Commission may be issued after living has been filled.

We have seen that the bishop, upon or at any time after the avoidance of any benefice, is required to issue his commission. Whether or not this may be strictly consistent with any discretionary power vested in him, it seems clear from the following section, which directs the report to be transmitted to the patron or *incumbent* (if any), that the proceeding may be under this statute, notwithstanding the benefice is filled.[s]

Mortgages by bishops for same purposes.

Since the passing of this last act, and in the year 1839,[t] power has been given to archbishops and bishops to raise money on the mortgage of their sees, for the purpose of building and otherwise providing fit houses for their residence. It would, however, appear scarcely necessary to enter into the different provisions of the statute which directs the manner in which this money is to be raised, since the details are the same as those to be observed in the case of money raised by an incumbent of a benefice.

[s] It will be observed in this section, that provision is made for compelling the insurance from fire of houses built under the provisions of the Gilbert Act, and Benefice Pluralities Act, and there appears to be every reason why the same should be made compulsory in the case of all houses of residence generally; for this, at a moderate expense, might prevent the benefice from becoming charged with the mortgage debt contracted for rebuilding in such a case.

[t] 2 & 3 Vict. c. 18.

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The interest of the sum borrowed is to be paid half-yearly; one-thirtieth of the principal at the end of the third year, and the same at the end of every subsequent year, until the whole is repaid. The house purchased or built must be within the province or diocese, in the case of archbishops and bishops respectively. The money borrowed is to be paid to a nominee or nominees in the same manner, and whose duties are the same as those already mentioned. The houses built or purchased are, in the same manner, to be insured from fire. Power is also given to purchase land for the purpose of a site and premises; and incapacitated persons are authorised to sell land for such purposes. In the case of the avoidance of a see, the archbishop or bishop avoiding it, or his executors, are to pay a proportion of the half-yearly interest, and of the annual instalment of the principal; and the governors of Queen Anne's Bounty are in like manner, as in the other cases, authorised to advance the money at four per cent. interest.

Section 7.

Rights as between Successive Tenants for Life.— Dilapidations.

An important branch of the law relating to the real property of ecclesiastical corporations sole, is that by which the rights in it are adjusted as between the successive tenants for life; for under this is included the subject of dilapidations, and with the consideration of these subjects, we shall be enabled to conclude the present chapter.

Freehold of glebe, &c. in abeyance.

Upon the death of the parson of a church, or of other ecclesiastical person seised *jure ecclesiæ*, the freehold of his glebe, or other ecclesiastical lands, is in abeyance,[n] that is, in expectation, remembrance or contemplation of law, until a successor is appointed; and the fee simple in such lands may be said to be always in abeyance, and this is one of the few instances in which a freehold estate can be in abeyance; for it is a principle of the highest antiquity in our law, that there should always be a known and particular owner of every freehold estate, from reasons derived partly from general convenience, and partly derived from feudal times.

Crops growing at decease of incumbent.

In case any incumbent, before his death, has caused any of his glebe lands to be manured and sown at his own proper costs and charges with any corn or grain, he may

[n] Litt. 674.

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make and declare his testament of all the profits of the corn growing upon the said lands so manured and sown.[x] But, in such a case, it is presumed that the succeeding incumbent would be entitled to some share, or to compensation in respect of the profit which might have been made by him of the glebe lands since the time at which they came into his possession; for this is agreeable to the equity of succeeding statutes as to apportionment, and of the cases decided thereupon.[y]

Apportionment of rent between successive incumbents.

In a case where a lease for years, made by a rector, had ceased by his death, the succeeding incumbent received from the lessee a sum of money as the rent due for the whole year, in the course of which the lessor had died. But upon a bill filed by the executor of the deceased rector against the succeeding incumbent, it was held that the plaintiff was entitled to an apportionment.[z]

This case was decided subsequently to and in pursuance of the statute 11 Geo. II. c. 19, which enacts, that where any tenant for life shall die before or on the day on which any rent was reserved or made payable, upon any demise or lease of lands, tenements or hereditaments, which determined on the death of such tenant for life, the executors or administrators of such tenant for life may, in an action on the case, recover from such under-tenant or undertenants of such lands, &c., if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due, making all just allowances, or a proportionable part thereof, accordingly. And in order that the payment of such year may be justly and equitably ascertained and adjusted between the successors and the parson, vicar, or incumbent, avoiding such living by death or otherwise, or his representatives, in such proportions as the profits of such living shall have been received by them respectively for the year in which such death or avoidance shall happen, it is enacted, that in case any difference shall arise in adjusting or settling the proportions aforesaid, the same shall be determined by two indifferent persons, the one to be named by the said successor, and the other by the person making such avoidance, or his representatives in case of his death; and in case such nominees shall not be appointed within the space of two calendar months next after such death or avoidance, or if

[x] 28 Hen. 8, c. 11.
[y] 11 Geo. 2, c. 19; 4 & 5 Will. 4, c. 22. [z] *Hawkins* v. *Kelly*, 8 Ves. 308.

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they cannot agree in adjusting such proportions within the space of one calendar month after they shall have been appointed, the same shall be determined by some neighbouring clergymen, to be nominated by the ordinary, whose determination shall be final and conclusive between the parties; which nominations and determinations shall be made according to the forms for that purpose contained in the act.

And as to apportionments, the principle of the last-tioned act is extended by the stat. 4 & 5 Will. IV. c. 22, by which the principle of equitable apportionment is applied to all property which consists in periodical and fixed money payments, such as rents, rent charges, &c. Whether, therefore, under this statute, or independently of it, there can be no doubt but that the rent of glebe and other ecclesiastical lands would be fairly apportioned between the deceased or outgoing and the incoming tenant for life; nor would the case be different in principle, where the lands had been in the actual occupation of the former.[a]

No action by a successor for miscultivation of lands.

But there is no law which compels the incumbent to cultivate the glebe lands in a proper and husbandlike manner, so that the successors may receive them in that state; nor could there be any actions for dilapidations, although the land had been miscultivated. For, as observed by Lord Denman, in order to render the executors of an incumbent liable for dilapidations, there must be something of demolition; and there is, consequently, no ground for saying they could be liable for mismanagement of the glebe lands. And it was said by another of the judges in the same case—"An action by a landlord against a tenant for the mismanagement of his farm, lies on an implied contract to cultivate the lands in a husbandlike manner: no such contract can be implied between the parson and his successor.[b]

Secus, for non-repair of hedges, fences, &c.

But the hedges, fences, gates, &c. upon glebe lands, are among the things of which the beneficed parson has the burden and charge of reparation; and there is no doubt that as to such things, the executors of a deceased incumbent are liable to the successor for dilapidations, if these have been allowed to become decayed or ruinous.[c]

Duty of repair on new lands acquired as glebe, fences, &c.

And the decision come to after deliberation in this same case is not only important in itself, but likely to become much more so from its applicability to the numerous cases in which, under the recent statutes, new lands may be acquired as glebe; for it was there decided, that an allot-

[a] Sect. 2. [b] *Bird* v. *Ralph*, 4 Barn. & Ad. 826.
[c] Littledale, J., in *Bird* v. *Ralph*, 2 Ad. & Ell. 773.

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ment made to a vicar in lieu of tithes under an inclosure act, is subject to the law and custom of England as to dilapidations equally with the ancient glebe; and if when the vicar comes into possession of it there are fences upon it which he ought to repair, but which he dies leaving unrepaired, his executors are liable at the suit of his successor. In that particular case land was by the act to be first well and sufficiently fenced, in such manner as the commissioners should direct, at the public charge; but for ever afterwards to be repaired at the charge of the vicar and his successors. And an appeal was given to parties aggrieved by anything done in pursuance of the act, provided the appeal was brought within four months. The fences which were put up by the commissioners being calculated to last only three or four years, became ruinous, and so remained until the death of the incumbent, about eleven years after the inclosure; no steps having been taken by him to obtain a remedy for the neglect to fence properly. It was held, that as no appeal had been brought, the commissioners must be considered to have done what was necessary; and that the representatives of the deceased vicar were liable to the successor for dilapidation of the fences. And it was expressly stated by Mr. Justice Littledale in giving judgment, that this decision did not rest upon the particular directions of the act, which cast the burthen of repair on the vicar and his successors; but that as it came to the vicar in an inclosed and fenced state, he was bound by the common law to keep it so, at his own expense.[d]

If a benefice were endowed with new land, or with an allotment of common, or if any land were acquired to it as glebe, by virtue of any exchange or by purchase under the recent acts, or, as it is to be presumed, in any other manner, and there were no fences upon it, the incumbent would not, in the absence of special enactment or agreement, be bound to put up fences; for that would only be like the case above-mentioned of a mismanagement of the glebe lands;[e] and there would be nothing of the nature of demolition, so as to render his representatives liable for dilapidation. But if he were in any such cases to put up fences, &c. he must then keep them in repair for the future; and if they should be left in a ruinous state, an action for dilapidations in respect of them would lie.[f]

Duty of an incumbent upon every acquisition of new lands.

It becomes therefore of great importance in every case in which new land is to be acquired to any benefice as glebe, that the incumbent should take care that all those

[d] See judgment of Littledale, 2 Ad. & El. 781.
[e] *Bird* v. *Ralph*, supra.
[f] Littledale, J., supra.

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things, in respect of which he would be liable for dilapidation, are at that time in a perfect state of repair; for upon the authority of the above case, it seems clear that it would be no valid excuse or defence to an action for dilapidations, to prove that any of these things were out of repair, or likely to become out of repair, at the time when they came into his possession.

Dilapidations in buildings, &c.

But by far the most common cause of action for dilapidations is in respect of the house of residence and other buildings upon the glebe lands; and this subject appears at a very early period to have engaged the attention of the legislature and of the ecclesiastical courts.

What it is.

Dilapidation is said to be the pulling down or destroying in any manner any of the houses or buildings belonging to a spiritual living, or suffering them to run into ruin or decay, or wasting or destroying the woods of the church, or committing or suffering any wilful waste in or upon the inheritance of the church.[g]

Proceedings by the new incumbent.

A bishop as soon as he is installed, and a rector or vicar as soon as he is inducted, ought to procure skilful workmen to view the dilapidations or whatsoever shall want repairing, and write down for what sum a workman may or will repair or rebuild the same, and set their hands to the same for a memorial thereof, when they shall be called as witnesses thereunto. For after this inspection is made the bishop, rector, vicar, &c. may commence his suit for dilapidations when he pleases. And such workmen, in support of the action, ought to prove that such decay cannot sufficiently be repaired or amended for less than such sum, and that they themselves would not do it for less; and that such proof may be sufficient, it is requisite that there be two witnesses in every particular, and not one witness to one kind of work only, and another to another.[h]

By representatives of deceased incumbent.

When the estimate has been thus made, the representatives of the late incumbent may examine other surveyors to contradict the estimate made, and to prove it to be excessive; and if this can be done satisfactorily, the amount awarded would of course be reduced; or supposing the defendants in such a case to have made a tender of the sum they have deemed sufficient, or paid the same into court, and their estimate was adjudged to be correct, they would be entitled to a verdict with costs.[i]

In cases of waste.

Several questions concerning dilapidations are very nearly allied to those concerning waste, of which we have already spoken; these therefore it will be unnecessary to

[g] Degge, 118.
[h] See 2 Burn, E. L. 147.
[i] *North* v. *Barker*, 3 Phill. 307.

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repeat here; but it may be laid down generally, that in every case of waste committed or permitted by an ecclesiastic on lands which he holds *jure ecclesiæ*, and by which his successor might be damnified, the successor would have his remedy for the injury in the usual action for dilapidations.

Principle on which dilapidations are to be calculated.

The case of *Wise* v. *Metcalfe*,[k] decided in 1829, is a leading authority to show the extent of liability for dilapidations in the case of house and buildings, and in what manner and according to what principle these dilapidations are to be calculated.

In that case it appeared that the rectory house was an ancient structure, built with timber, and plastered on the outside, and had upon it the date of 1624. The barns were also old, but not of equal age with the rectory house. The dilapidations of the rectory house, barns, stables, outbuildings, and of the chancel of the church, amounted to 399*l.* 18*s.* 6*d.*, provided the principle upon which the estimate had been made was correct. The principle was, that the former incumbent ought to have left the rectory house, buildings and chancel in good and substantial repair; the painting, papering and whitewashing being in proper decent condition for the immediate occupation and use of his successor; that such repairs were to be ascertained with reference to the state and character of the buildings, which were to be restored, where necessary, according to their original form, without addition or modern improvement. It was proved by the several surveyors of experience examined on the part of the plaintiff and also of the defendant, that they had invariably estimated the dilapidations between the incumbent of a living and the representatives of his predecessors upon the above principle.

Principles proposed in *Wise* v. *Metcalfe*.

1st principle.

If however the rectory house, buildings and chancel were to be repaired in the same manner only as buildings ought to be left by an outgoing lay tenant, who is bound by covenant to leave them in good and sufficient repair, order and condition, the expense of such reparations amount to 310*l.*, the painting, papering and whitewashing not being included in the last estimate.

2nd principle.

And if the former incumbent was only bound to leave the rectory house, buildings and chancel wind and water tight, or in that state of reparation which an outgoing lay tenant of premises, not obliged by covenant to do any repairs, ought to leave them, then the expenses of re-

3rd principle.

[k] 10 Barn. & Cres. 299.

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pairing the rectory, buildings and chancel amounted to 75*l.* 11*s.*

The question for the determination of the court was, which of these proposed principles of valuation was the correct one; and the damages were to stand for 399*l.* 18*s.* 6*d.*, or 310*l.*, or 75*l.* 11*s.*, according as they should decide.

This case was very fully argued; and the custom of the country in this respect underwent a very complete discussion. Mr. Justice Bayley delivered the judgment of the court, and after stating the several principles of valuation that had been submitted to the court for their opinion, continued:

Principle laid down by Queen's Bench.

"We are not prepared to say that any of these rules are precisely correct, though the second approaches most nearly to that which we consider as the proper rule. The common law, as stated in some of the earliest precedents, is as follows: 'Omnes et singuli prebendarii, rectores, vicarii, &c., pro tempore existentes, omnes et singulos domos et edificia prebendariarum, rectoriarum, vicariarum, &c., reparare et sustentare, et ea successoribus suis reparata et sustentata, dimittere et relinquere teneantur: et si hujusmodi prebendarii, rectores, vicarii, &c. hujusmodi domos et edificia successoribus suis, ut præmittatur, reparata et sustentata non dimiserint et reliquerint, sed ea irreparata et dilapidata permiserint, eidem prebendarii &c. in vitis suis, vel eorum executores sive administratores, &c. post eorum mortem, successoribus prebendariorum, &c. tantam pecuniæ summam quantam pro reparatione aut necessariâ re-edificatione hujusmodi domorum et edificiorum expendi aut solvi sufficiet, satisfacere teneantur." From this state of the common law two propositions may be deduced, first, that the incumbent is bound not only to repair the buildings belonging to his edifice, but also to *restore* and *rebuild* them if necessary. Secondly, that he is bound only to repair, and to *sustain* and *rebuild* them when necessary. Both these rules are very reasonable; the first because the revenues of the benefice are given as a provision not for the clergyman *only*, but also for a suitable residence for that clergyman, and for the maintenance of the chancel; and if by natural decay, which notwithstanding continual repair must at last happen, the buildings perish, these revenues form the only fund out of which the means of replacing them can arise. The second rule is equally consistent with reason, in requiring that which is useful only, not that which is matter of ornament or luxury. It follows from the first of these propositions that the third mode of computation cannot be the right

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one, because a tenant not obliged by covenant to do repairs, is not bound to rebuild or replace: the landlord is the person who, when the subject of occupation perishes, is to provide a new one, if he thinks fit. And if the second proposition be right, a part of the charges contained in the first mode of computation must be disallowed; for papering, whitewashing, and such part of the painting as is not required to preserve wood from decay by exposure to the external air, are rather matters of ornament and luxury than utility and necessity. The authorities cited from the canon law are in unison with what we consider to be the rule of the common law. The earliest provision on this subject is the provincial constitution of Edmund Archbishop of Canterbury, passed A. D. 1236, 21 Hen. III. It is in the following terms: "Si rector alicujus ecclesiæ decedens domos ecclesiæ reliquerit dirutas vel ruinosas, de bonis ejus ecclesiasticis tanta portio deducatur quæ sufficiet ad reparandum hæc et ad alios defectus ecclesiæ supplendos." That constitution therefore directs the repairing "domos ecclesiæ dirutas vel ruinosas;" and Lindwood's commentary upon the words ad reparandum is, "scilicet diruta vel ruinosa: et intellige hanc reparationem fieri debere secundum indigentiam et qualitatem rei reparandæ: ut scilicet impensæ sint necessariæ, non voluptuosæ." The next authority cited from the common law was the following legatine constitution of Othobon, promulgated A. D. 1268, 52 Hen. III. "Improbam quorundem avaritiam prosequentes qui cum de suis ecclesiis et ecclesiasticis beneficiis multa bona suscipiant domos ipsarum et cætera edificia negligunt ita ut integra ea non conservent et diruta non restaurent." That is the imputation against the clergy. The constitution then goes on: "Statuimus et præcipimus ut universi clerici suorum beneficiorum domos et cætera edificia prout indiguerint reficere studeant condecenter ad quod per episcopos suos vel archidiaconos solicitè moneantur. Cancellos etiam ecclesiæ per eos qui ad hoc tenentur refici faciant ut superius est expressum. Archiepiscopos vero et episcopos, et alios inferiores prælatos, domos et edificia sua sarta tecta et in statu suo conservare et tenere sub divini judicii attestatione præcipimus, ut ipsi ea refici faciant quæ refectione noverint indigere." The statute 13 Eliz. c. 10, speaks of ecclesiastical persons suffering their buildings, for want of due reparation, partly to run to ruin and decay, and in some part utterly to fall to the ground, which, by law, they are bound to keep and maintain in repair; and makes the fraudulent donee of the goods of an incumbent liable for such dilapidations as hath happened by his fact and de-

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fault. If the incumbent was bound by law to keep and maintain the dwelling-house in repair, any breach of his duty in that respect would be a default. The 57 Geo. III. c. 99, s. 14, enacts, that a non-resident spiritual person shall keep the house of residence in good and sufficient repair, and directs, that if it be out of repair and remain so, the parson is to be liable to the penalties of non-residence until it is put in good and sufficient repair, to the satisfaction of the bishop. There is nothing either in the authorities cited from the canon law, or in these acts of parliament, to show that the obligation of an incumbent to repair is other than that which I have already stated the common law threw upon him, viz. to sustain, repair, and rebuild when necessary.

"Upon the whole we are of opinion that the incumbent was bound to maintain the parsonage, (which we must assume upon this case to have been suitable in point of size and in other respects to the benefice,) and also the chancel, and to keep them in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition or modern improvement; and that he was not bound to supply or maintain any thing in the nature of ornament, to which painting (unless necessary to preserve exposed timbers from decay) and white-washing, papering, belong; and the damages in this case should be estimated upon that footing. It will be found that this rule will correspond nearly with the second mode of computation, and probably will be the same if the terms, order and condition are meant, as they most likely are, not to include matters of ornament or luxury."

It was afterwards referred to the master to calculate the damages upon this principle, and to report for what the judgment should be entered up; and he directed it to be for 369*l.* 18*s.* 6*d.*, and for that sum there was judgment for the plaintiff.

A very full report of the judgment in the above case has been inserted because it appears fully to embody all that is necessary to be known upon this branch of the subject; and by attention to the general principle which is there laid down as that by which dilapidations are to be calculated, each particular case, as it arises, may without difficulty be determined.

Consequence of delay in claim for dilapidations.

But if a benefice had been for a long time vacant, as for three or four years, or if the incumbent had not sued for some time after his induction or installation, nor caused the dilapidations to be viewed or estimated, he shall not be entitled to recover the whole sum estimated for dilapi-

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dations; but consideration shall be had of the time elapsed from the cessation of the last incumbency, and a proportionable deduction made for the decays which may reasonably be supposed to have happened during such intermediate time.[l]

But a further danger arises to an incumbent who neglects to institute proceedings for dilapidations as soon as he is inducted or installed, namely, in case of his decease before any such claim has been made; for the bishop, rector or vicar may sue against the executors or administrators of the last incumbent, though the ruins or dilapidations happened not in their times, but in the times of their predecessors; and the reason is said to be, because those executors and administrators have the like action against the executors or administrators of their testator's predecessor, and may recover the value of the repairs against them.[m] But this remedy over might very often be inadequate; and although it is added by Conset, "that if the executor shows he has used due diligence to procure the dilapidations from the former bishop or incumbent, it would seem to be an answer," the truth of that proposition is very doubtful; and certainly if there had been any delay or negligence, there could be no valid defence to the action.

Application of money for dilapidations.

It is provided by statute that all sums of money to be recovered for or in the name of dilapidations by sentence, composition or otherwise, shall, within two years after such receipt, be truly employed upon the buildings and reparations in respect whereof such money for dilapidations shall be paid, on pain that every person so receiving and not employing the same as aforesaid shall forfeit double as much as shall be so by him received and not employed; which forfeiture shall be to the queen's majesty, her heirs and successors.[n]

In the case of houses built under the Gilbert Act or under the act of 1 & 2 Vict. c. 106, we have already seen that there is express provision made for the manner in which all sums received for or in the name of dilapidations are to be employed.[o]

In case of the death of an incumbent within the two years after he has received the money for dilapidations, it seems that the same ought to be paid by his executors to the successor, to be laid out by him, and not by the executors, in repairs.[p]

Who are liable.

A curate appointed by the impropriator, and duly licensed,

[l] 1 Ought. 255; Rogers's E. L. 313.
[m] Conset, 363.
[n] 14 Eliz. c. 11, s. 18.
[o] See ante.
[p] Gibs. Cod. 754.

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which would be the common case in perpetual curacies, is said to be not liable for dilapidations; but where curacies or chapels have been augmented by Queen Anne's Bounty, they are considered as benefices, and the holders or their representatives are liable for dilapidations.[q]

Buildings under the Gilbert Act.

All houses and buildings erected under the provisions of the Gilbert Act, or the 1 & 2 Vict. c. 106, would, as to dilapidations, be included in the general rule before mentioned, that when any thing has once been placed on the glebe lands, the incumbent must maintain it in a proper state of repair.[r] And although the house of residence has in such a case been in a great measure built at the expense of the incumbent, and previous to his incumbency there had been no house on the benefice, yet he would nevertheless be liable for dilapidations.

Church building acts.

In the case of the churches and chapels built under the provisions of the several church building acts, wherever any house has been built or purchased for the incumbent, he is in like manner liable for dilapidations, if such house should be left out of repair; for all ecclesiastical persons that are beneficed are required to repair; and by these statutes the incumbents of such churches are declared to be subject to all laws relating to the holding of benefices and churches, and to all laws and jurisdictions ecclesiastical and common. And it seems that the liability to dilapidations is incident to all beneficed ecclesiastical persons.

An action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his predecessor.[s]

Living under sequestration.

If a living is under sequestration, the sequestrators must keep all the premises in repair; and the profits in their hands are liable for this purpose just as if the incumbent were himself in possession, for the sequestrator cannot be in a better position than the incumbent would have been, nor exempt from any of those charges to which the incumbent would have been liable: and it follows from this, that a succeeding incumbent may have his remedy for dilapidations against the sequestrators of the profits during the preceding incumbency.[t]

Nor is it the executor of a deceased incumbent only who is liable to be sued for dilapidations; but the incumbent himself who leaves his benefice for some other preferment, or for any other reason, is also liable to such an action;

[q] See *Curate of Orpington's case*, 3 Keble, 614; *Price* v. *Pratt*, Bunb. 273; 1 Geo. 1, stat. 2, c. 10.

[r] *Bird* v. *Ralph*, ante.

[s] *Dr. Sands' case*, Skin. 121.

[t] *Hubbard* v. *Beckford*, 1 Cons. 307; *Whinfield* v. *Watkins*, 2 Phill. 8.

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nay, even though he should exchange his benefice for some other, upon the supposition of equality, he would nevertheless be liable.[u]

Payment of debts to be preferred.

As to the manner in which sums found due for dilapidations are paid by the executors of the deceased incumbent, Gibson remarks, "Executors charged with dilapidations are bound to make satisfaction for them before payment of legacies." But Sir Simon Degge says there has been a further question whether satisfaction for dilapidations should be preferred in payment before debts and legacies; and as the common law prefers the payment of debts before damage for dilapidations, so the ecclesiastical law prefers the damage for dilapidation before the payment of debts, upon which Gibson remarks that, being the course of the common law, we must be content.[x]

Fraudulent gifts to defeat claim for dilapidations.

But whatever may be the disadvantage which a party claiming sums due for dilapidations may be placed under in this respect, an important benefit is intended to be conferred on him by the following statute of the 13 Eliz. c. 10.

As divers ecclesiastical persons, being endowed and possessed of palaces, houses and other edifices and buildings belonging to their ecclesiastical benefices or livings, have not only suffered the same, for want of due reparations, partly to run to great ruin and decay, and in some part utterly to fall down to the ground, converting the timber, lead and stones to their own benefit, but also have made deeds and gifts, &c. of their goods and chattels in their lifetime, to defeat and defraud their successors of such remedies, &c. as otherwise they might have had against their executors or administrators by the laws ecclesiastical of this realm, it is enacted, that if any archbishop, bishop, dean, archdeacon, provost, treasurer, chaunter, chancellor, prebendary, or any other having any dignity or office in any cathedral or collegiate church, or if any parson, vicar, or other incumbent of any ecclesiastical living whereunto belong any house or houses or other buildings which by law or custom he is bound to keep and maintain in reparation, do make any deed of gift or alienation, or other like conveyance of his moveable goods or chattels, to the intent and purpose aforesaid, the successors of him that shall make such deed of gift or alienation shall and may commence suit and have such remedy in any ecclesiastical court of this realm competent for the matter, against him or them to whom such deed of gift or alienation shall be so made, for the amendment and reparation of so much of the said dilapidations and decays, or just recompense of

[u] See Exchange, post.

[x] Gibs. Cod. 791; Rogers's E. L. 311.

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the same, as hath happened by his fact or default, in such sort as he might or ought to have had if he to whom such deed of gift or alienation shall be so made were executor or administrator of him that made such deed or alienation.

Some doubt is expressed in Dr. Burn's book on ecclesiastical law, as to whether this statute is still in force; but it does not appear that such doubts have any reasonable foundation. It is to be observed, however, that the statute speaks only of such gifts, &c. as are made to defeat and defraud their successors; and it would therefore be necessary, in order for the successor to set aside such gift, &c., and to avail himself of this statute, that such fraudulent intent should be proved; and if this could be done, it is presumed that any such gifts, &c. would be voidable at common law, or at any rate in courts of equity, without the aid or assistance of the statute,[y] for every such gift, &c. would of necessity be without any consideration, and no injury would in that case be done to the party to whom it may have been made; while if any sufficient consideration was made for the gift, &c. it would seem that no remedy could be had against the party to whom the gift had been made.

Successor must be seised of tenements in right of which he sues.

An incumbent can only sue for dilapidations in an action at common law in respect of tenements of which he is seised in right of his benefice; and although it appeared, in an action of this kind, that successive rectors had been in possession of certain premises for fifty years last past, the fee was shown to be in certain devises in trust under circumstances which prevented the presumption of there having been any conveyance duly enrolled to the use of the benefice, and it was held there could be no suit for dilapidations; and the counsel in that case referred to an old case of *Griffin* v. *Stanhope*, in which it was said in argument, and not denied, if a person show that for two hundred years certain land was parcel of his glebe, it is not therefore of necessity that the other should produce a confirmation from the patron and ordinary, for the continuance of the possession makes it intendible to be according to law at the time it was made.[z]

Also the predecessor who is sued.

And so in a yet stronger case, in an action for dilapidations by a vicar against his predecessor, the plaintiff declared that the defendant was seised of the premises in question in right of his vicarage. But it appeared that the premises were copyhold, and were devised to the master and senior fellows of Trinity College, Cambridge,

[y] See 1 Storey, Equity Jurisp. tit. Fraud.
[z] *Wright* v. *Smythies*, 10 East, 409.

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in trust to permit the vicar for the time being to receive the rents and profits (the charges to the lord and expenses for necessary reparation being first deducted). It was held that, as there was no seisin in the vicar, the plaintiff could not maintain this action.[a]

Insufficiency of the above remedies.

Although the remedy thus given for dilapidations is as full as the nature of the case will admit of, yet it would not be universally sufficient; for it might frequently happen in such cases that the late incumbent might be insolvent, and that he who had not sufficient funds to put his house in proper repair for his own comfort during his life, would not leave sufficient to enable others to do so after his decease. Thus, insolvency of the incumbent and dilapidations of his house of residence have been very frequently found connected, the latter being the consequence of the former.

Repairs may be compelled during lifetime of incumbent.

Ample powers are therefore given to bishops and archbishops, both by the common law and by statute, to compel incumbents to keep the houses and premises on their glebe in a proper and sufficient state of repair; and the punishment for dilapidations may be even deposition or deprivation, for it is said, If any ecclesiastical person do or suffer to be done any dilapidations, they may be punished in the ecclesiastical courts, and the same is a good cause of their deprivation of their ecclesiastical livings and dignities.[b] But these extreme measures do not appear now to be ever resorted to, but the usual method of preventing dilapidations is that pointed out by the canon law. For the rural deans are to inspect churches, &c., and houses belonging to the parsons and vicars within their districts, and to give information of decays and dilapidations to the ordinary; and it is also a part of the duty of the archdeacon to visit his subordinate clergy once at least in every three years, for the purpose, *inter alia*, of surveying the mansion-house of every incumbent, as well as to cause the same, if need require, to be fitly repaired.

The archdeacon therefore, as it seems, or the bishop, upon report made to him by the rural dean, should admonish the incumbent to cause to be executed the necessary repairs; and if the incumbent, being admonished, should neglect or refuse so to do, the bishop, by ecclesiastical censures and other lawful remedy, and also by sequestration of the profits, may compel the repairs to be done.[c]

Supposing sequestration to be had recourse to, one-fifth part of the annual value of the living is usually the amount

[a] *Brown* v. *Ramsden*, 8 Taunt. 559.
[b] Degge, 77; Ayliffe's Parerg. 218.
[c] Ayliffe's Parerg. ibid.

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sequestered, and if the incumbent is dissatisfied he can appeal; but it seems that any less part than one-fifth might be sequestered; and where the ecclesiastical court is called on to sequester, it was said by Sir J. Nicholl that it seldom lays apart more than one-fifth.[d] Of the duties of the sequestrators in such cases we shall have to speak hereafter, when we come to the general subject of sequestrations.[e]

And here we may remark, that this proceeding may be in like manner had recourse to, in order to compel the incumbent to repair the chancel, wherever the charge of executing such repairs is cast upon him.

And in the case of the bishop himself, who should suffer the episcopal palace or other structure with the repair of which he was charged to become dilapidated, he might be suspended by the archbishop, and the profits of his bishopric in like manner sequestered, as was the case of Dr. Wood, Bishop of Lichfield and Coventry, who was suspended by Archbishop Sancroft, and the episcopal palace was built out of the profits so sequestered.[f]

Where incumbent is non-resident.

Another common cause of dilapidations was the non-residence of incumbents on their benefices. This has, however, been remedied by recent statutes, of which we shall have to speak when we come to the subject of the residence of the clergy; by one of those statutes it is enacted,[g] that every spiritual person having a house of residence on his benefice, and not residing therein, shall, during such period of non-residence, keep such house in good and sufficient repair; and that the bishop may cause a survey of such house to be made by some competent person, the costs of which, in case the house is found to be out of repair, shall be borne by such spiritual person; and if the surveyor shall report that such house is out of repair, the bishop may issue his monition to the incumbent to put the same in repair according to such survey or report, a copy of which is to be annexed to the monition, and every such non-resident spiritual person who shall not keep such house in repair, or who shall not, upon such monition, and within one month after service of the monition, show cause to the contrary, to the satisfaction of the bishop, or put such house in repair within the space of ten months, to the satisfaction of such bishop, shall be liable to all those penalties for non-residence of which we shall hereafter speak, during the period such house of residence remains out of repair; which penalties are in fact sequestration, the first application of the sequestered profits being to the

[d] *North* v. *Barber*, 3 Phill. 307.
[e] See post.
[f] Cited 12 Mod. R. 237.
[g] 1 & 2 Vict. c. 106, s. 41.

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purpose of putting the premises in repair.[h] It should be observed, however, that it does not appear from the words of the above section by whom the costs of the survey are to be paid, in case the house, upon the occasion of such survey, is not found to be out of repair.

This enactment, as has very frequently happened in the recent statutes relating to ecclesiastical matters, appears to have been made without a due consideration of the law already existing, and in this case without consideration of the powers already vested in the bishop and archdeacon, for compelling the repair of dilapidations. Those powers, however, are not repealed, nor in any manner interfered with by this statute; they appear to have been amply sufficient, and well adapted for the purpose, nor is it easy to see in what respect the present enactment introduces any improvement; though it might probably create confusion, by making it appear that the repairs of dilapidations could be compelled by the bishop only in the case of a non-resident incumbent.

In speaking here of the manner in which dilapidations are to be prevented and reparation enjoined, we are speaking generally only of permissive dilapidations or permissive waste; not because the same remedies might not be had recourse to in the case of wilful and actual dilapidations, but because there are other methods which we have spoken of under the subject of waste, which would be probably better adapted to cases which might require an immediate remedy, and a stop to be put to such wilful damage, such as we have already noticed under the subject of waste.

CHAPTER II.

OF TITHES AND TITHE RENT-CHARGE.

General provision for persons ecclesiastical, by means of.

THE provisions which we have hitherto mentioned for the maintenance of persons ecclesiastical, are partial endowments only for the benefit of particular corporations, or form but a small part of the means of support to the great body of the clergy. But we now come to consider that general provision which has been established, of the tithe

[h] See post, Sequestration.

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or tenth part of the produce of our lands, for the proper maintenance and support of the whole ecclesiastical body.

An honourable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be. For besides the positive precepts of the New Testament, natural reason will tell us that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be furnished with necessaries, conveniences, and moderate enjoyments of life, at their expense, for whose benefit they forego the usual means of providing them.[a]

Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy; ours in particular have established this of tithes, probably in imitation of the Jewish law. And perhaps, says Blackstone, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land, than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions.[b]

Origin of.

During the first ages of Christianity, the clergy were supported by the voluntary offerings of their flocks; but this being a precarious existence, the ecclesiastics in every country of Europe claimed, and in the course of time established, a right to the tenth part of all the produce of lands.[c] At what time this right was claimed or finally established in this country, it is impossible to ascertain precisely; but the first mention of them which Blackstone says that he has met with in any written English law, is in a constitutional decree made in a synod held A. D. 786, wherein the payment of tithes in general is strongly enjoined. This canon or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the Heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia and Northumberland, the bishops, dukes, senators, and people.[d]

The next authentic mention of them is in the *Fœdus Edwardi et Guthruni*, or the laws agreed upon between King Guthrun, the Dane, and Alfred, and his son Edward the elder, successive kings of England about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws,[e] wherein it was necessary, as Guthrun was a Pagan, to provide for

[a] 2 Black. Com. 24. [b] Ibid. [c] 3 Cruise's Dig. 37.
[d] 2 Black. Com. 25. [e] Wilkins, 51.

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the subsistence of the Christian clergy under his dominion; and accordingly we find the payment of tithes not only enjoined, but a penalty added upon non-observance, which law is seconded by the laws of Athelstan about the year 930. This is, perhaps, as much as can be traced out with regard to their legal origin.[f] But without doubt the right had been fully admitted in England before the Norman conquest; the name of tithes being acquired from a Saxon word, signifying tenth.[g]

Were established before the Norman conquest.

Tithes are of that class of things which are termed incorporeal hereditaments, which are rights issuing out of things corporate, whether real or personal, or concerning or annexed to, or exerciseable within the same; and they may be defined to have been a right to the tenth part of all the produce of lands, the stock upon lands, and the personal industry of the occupiers, but in their essence they have nothing substantial or permanent; they consist merely in *jure*, and are only a right. So that an estate in tithes is no more than a title to a share or portion of the produce of a certain tract of land, after it shall have been separated from the general mass.[h]

Definition of.

Tithes were originally a mere ecclesiastical revenue, ecclesiastical persons only having a capacity to take them, and ecclesiastical courts only having cognizance of them.[i] Originally, moreover, though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased, which were called arbitrary consecration of tithes, or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the Church, which were then in common; but when dioceses were divided into parishes, the period of which cannot be ascertained with any degree of certainty, the tithes of each parish were allotted to its own particular minister, first by common consent, or by the appointment of lords of manors; and afterwards, as Blackstone says, by the written law of the land.[k] But whether by statute or by common law (for opinions vary upon the subject) the right of the parsons of the several parishes to tithes, and to demand and enforce the render of them, became part of the general law of the land.[l]

[f] 2 Black. Com. 26. [g] 3 Cruise's Dig. 37. [h] Bacon's Abr. Tithes.
[i] 11 Rep. 13; 4 Leon. 47. [k] Com. b. ii. ch. 3.
[l] *Attorney-General* v. *Lord Eardley*, 8 Price, 39; Shelford's Law of Tithes. In the present treatise it is proposed altogether to avoid entering upon what may now be called the old law of tithes, although at the present time, and perhaps for a very limited time to come, matters connected with those subjects may still engage the attention of the courts. By the old law, we mean that of

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It would be much too wide a deviation from the general purpose of this work, if we were to enter further into the history of the origin of tithes, or upon the general subject of appropriation, as it has little or perhaps no bearing upon the present state of the law.

Exemptions from tithe formerly.

Formerly it might have been laid down as a general law, that all lands in this country in the hands of laymen were subject to the payment of tithes, until special exemption could be shown, so much so, that by the old law no layman was allowed to prescribe generally that his lands were exempt from payment of tithes;[m] for without special matter shown, it could not be intended that he had any lawful discharge. And even though non-payment of tithes from time immemorial could have been proved, the maxim *nullum tempus occurrit ecclesiæ* prevailed, so that no evidence of length of possession would have been regarded, for it was said the possession must have been unlawful.[n] To this rule there would now be many exceptions, but for the purposes of practical arrangement, and more easy consideration of the subject, it will be best to reverse the rule, and to state that all lands in this country, with the exceptions hereafter mentioned, are freed and discharged from the actual render of tithes by some one of the following methods:

Arrangement of the subject.

Discharge of all lands from tithes.

1. By non-payment of any tithe for a certain length of time.
2. By having formerly been parcel of the possessions of a privileged order, or as having been formerly or being now the property of ecclesiastical persons or bodies, or of the crown.
3. By compositions real.
4. By private acts of parliament in individual cases.
5. By some established *modus decimandi*.
6. By rent-charge in lieu thereof.
7. By lands given in lieu thereof.

the various things which were or were not titheable, and of the manner in which, and the time when, the tithes of different kinds of produce were payable. The complicated decisions on these subjects might be made to fill a number of volumes, and no very condensed account of them would be intelligible. As the subject therefore will soon have lost all its interest, it has been thought best to omit it altogether.

[m] Black. Com. b. ii. ch. 3. [n] *Scott* v. *Airey*, 2 E. & Y. 342.

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Section 1.

Discharge of Lands from Payment of Tithes by Non-payment for a certain Length of Time.

The non-payment of tithes, even though from time immemorial, (which, in other cases, would be sufficient to establish a valid custom), was not formerly, as we have already observed, any valid ground of exemption in this case. But its validity as a ground of exemption, is now fully established by, and consequently entirely depending on, the statute of the 2 & 3 Will. IV. c. 100, by which it has been declared, that all prescriptions and claims of or to any exemption from or discharge of tithes, shall, in all claims for tithes by the king or any lay persons, not being corporations sole, or by any body corporate, be deemed good and valid in law, upon evidence showing, in cases of claim to exemption or discharge, the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless the render or payment of tithes or of money, or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or unless it shall be proved that such enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing. And where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such enjoyment had as is hereinbefore mentioned for and during the whole time that two persons in succession shall have held the office or benefice, in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto, provided that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such enjoyment had not only during the whole of such time, but also during such further number of years,

In claims by laymen and corporations aggregate.

In claims by corporations sole.

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either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years; and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing.

Commencement of the operation of the act.

This act, however, was not to have any operation in suits or actions already commenced at the time of its passing, or which might be commenced within one year after the session of parliament in which it was passed,[o] which ended on the 16th of August, 1832.

The consequence of this was that a great number of suits, amounting, it is said, to about 300, were immediately instituted by parties claiming tithes, in order that they might not be debarred by the effects of the act, but avail themselves of the year of grace allowed them. It was, therefore, considered advisable to enable the defendants in this number of suits to cause all further proceedings to be for a time suspended; and it was provided by another act of parliament passed in the 4 & 5 Will. IV., that such defendants might, with the consent of the plaintiff, pay the amount of the taxed costs and expenses, which might have been incurred by the plaintiffs, into the Bank of England, to the credit of such action or suit; and that when that should have been done, all further proceedings in such actions or suits should be stayed, until the end of the next session of parliament, which would be about one year from that time. And that at the end of the next session, the plaintiffs in the actions or suits which had been so stayed might give notice to the defendants of their intention to proceed, and proceed accordingly; and that then after such notice given, the defendants should be entitled to receive out of court the sums which they had so previously paid in.[p] If the plaintiff accepted the costs, and took them out of court, which he was empowered to do, all further proceedings were to be for ever abandoned.[q]

Exceptions from operation of act.

Another exception from the operation of the above statute is, where the lands, for which exemption by nonpayment is claimed, are or have been held or occupied by any person who would have been entitled to the tithes thereof; or by the lessee or sublessee of any such person, in such way as that the right to the tithes would have been during any time in the occupier thereof, or in the person entitled

[o] Sect. 3. [p] 4 & 5 Will. 4, c. 83, ss. 1, 2. [q] Sect. 3.

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to the rent thereof, in which case the whole of such time is excluded in the computation of time before directed.[r]

The act also contains the usual exception in favour of persons under legal disability, by declaring that the time, during which any person otherwise capable of resisting any claim should be under such disability, or during which any action or suit should have been pending and diligently prosecuted until abated by the death of a party, should be excluded from the computation; but these exceptions are not admissible in cases where it has been before declared that the right or claim to nonpayment is to be absolute and indefeasible.[s]

General rule in case of persons ecclesiastical.

In the absence, therefore, of any document in writing showing the nonpayment to have been by consent, the exemption is in all cases, without exception, absolute and indefeasible, as against persons ecclesiastical, if it can be proved that no payment has been made during the period of two incumbencies and the first three years of a third, supposing the period of the two incumbencies together to amount to sixty years; but if it does not, then if it can be proved that no payment has been made for sixty years, and the first three years of a third incumbency, or rather, it seems, it might have been said of a fourth, fifth, or any other incumbency; for though there had been twenty incumbents within the space of sixty years, the claim might still be prosecuted within three years after the induction of the twenty-first.

This section had been written before the appearance of the case of *Salkeld* v. *Johnston*,[t] decided by the Vice-Chancellor Wigram in the early part of 1842. The effect of that decision is, that the above statute does not create any new ground of exemption, or destroy the right to tithes in cases where the nonpayment or nonrender of tithes from the time of legal memory would, before the statute, have established no exemption. From that judgment, however, there has been an appeal, which is not yet decided; for which reason it appears best to leave what had been said on the subject unaltered, especially as it is very probable that if the case of *Salkeld* v. *Johnston* should be confirmed, some fresh legislative enactment would be passed to carry out the obvious intention of the previous statute. That the intention of that statute was to create a new ground of exemption, however insufficiently it may have been expressed, can scarcely be doubted.

[r] Sect. 5. [s] Sect. 6. [t] 1 Hare, 196.

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Section 2.

Discharge of Lands from Payment of Tithes by having formerly been Parcel of the Possessions of a Privileged Order, or as having been formerly or being now the Property of Ecclesiastical Persons or Bodies, or of the Crown.

Effect of the last mode of exception upon the present.

It will be obvious that the mode of exemption last mentioned, unless the case of *Salkeld* v. *Johnston* becomes law, is as it were a major proposition, which will include almost all the cases which might be mentioned under the present head; for that gives exemption to all lands whatsoever, after nonpayment of tithes for the time there mentioned. The present includes a variety of cases, where the nonpayment of tithes for a much longer period than there mentioned is in each case admitted and undoubted; and in most cases it would be easier and more simple to insist on the exemption by statute; for in the course of evidence that would necessarily be proved as a part only of what must be shown by those who claim exemption under this head. A great part, therefore, of what would formerly have been important under this head, is now become matter of history, rather than of actual law, and may consequently be passed over briefly.

Lands parcel of the possessions of a privileged order.

All abbots and priors, and other chief monks, were originally subject to the payment of tithes, as well as other persons, until Pope Paschal the Second exempted generally the religious orders from the payment of tithes in respect of lands in their respective actual possession; or, as it was expressed, *quamdiu propriis manibus excolunt*.[u] The three privileged orders are Cistercians, Templars and Hospitallers, which, on account of their order, have the privilege of being discharged from the tithes of lands in their own occupation.[x] The privilege extends only to such lands as these orders were possessed of at the time of the last general council of Lateran, in the seventeenth year of King John, A. D. 1215, when the privilege was strictly limited to such lands as were in their possession before the holding of that council. The exemption granted by the council was allowed by the general consent of the realm as part of the law of the land;[y] but the Cistercians endeavoured to evade this decree of the council by purchasing bulls of exemption for their lands in the occupation of their tenants or farmers, until by stat. 2 Hen. IV. c. 4, the Cis-

[u] 2 Rep. 44 b. [x] Toller, 171, 3d ed.
[y] 2 Inst. 651; *Staveley* v. *Ullithorne*, Hard. 101; 1 Wood, 24.

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tercians and all other orders purchasing or putting such bulls into execution incurred a præmunire.[a] The order of Templars was dissolved by stat. 17 Edw. II. st. 1, by which their lands were given to the prior of St. John of Jerusalem, so that long prior to the time of dissolution of the monasteries the Cistercians and Hospitallers were the only privileged orders.

Must be shown to have been such prior to the council of Lateran, and at the dissolution of the monastery.

An exemption from tithes on the ground of the lands having belonged to one of the privileged orders, did not rest on prescription; but the owner must formerly have shown satisfactorily that the monastery was seised of the lands before the above mentioned council of Lateran, and also at the time of the dissolution; and in a case where the owner of lands established the former, but failed to establish the latter fact, the court decreed an account of tithes.[a]

The exemptions from tithes enjoyed by ecclesiastical bodies would have ceased upon their dissolution, and the lands would again have become subject to tithes, had it not been enacted at the time of their dissolution,[b] that all persons who should come to the possession of the lands of an abbey then dissolved, should hold them free and discharged from tithe, in as large and ample a manner as the abbeys formerly held them; from which origin, Blackstone says,[c] have sprung all the lands which, being in lay hands, do at present claim to be tithe free.

It must be observed, however, that this statute was no discharge of lands from tithe, except where they had been already discharged in the hands of the religious houses, and that this was by no means universally the case; for none of these religious persons could be exempted from payment of tithes but by his order, the pope's bull, composition real, prescription, or unity of possession. Nevertheless, as they *might* have been exempted by any of these means, it has been held as a settled rule of common law, that persons holding lands which were formerly the property of these religious houses might prescribe *in non decimando*,[d] that is, to be free from the payment of tithes as respects such lands, without being required to give any further proof of the origin of the discharge than usage and enjoyment from time immemorial; which indeed is only in conformity with the general rule of our common law, that if a custom, which might have had a legal origin, shall be proved to have existed from time immemorial, the legal

What would be sufficient presumption that abbey lands had been exempt.

[a] 2 Inst. 632; Degge, 410, 411.
[a] *Norton* v. *Hammond*, 1 Younge & Jervis, 94.
[b] 31 Hen. 8, c. 13. [c] 2 Black. Com. 32. [d] Ibid.

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origin may be presumed: and, *à fortiori*, this would have been the case if the lands were still in the hands of ecclesiastical corporations, sole or aggregate, as bishops, deans and chapters, parsons or vicars, or of the king, who for this purpose is considered in his ecclesiastical character.

In order to support this prescription, three things must be clearly shown; 1st, that the lands were abbey lands; 2nd, that they were held by the abbey at the time of its dissolution; and, 3rd, that they have been immemorially discharged from tithes;[e] under which circumstances the presumption is allowed that they had been properly discharged by some one of the methods before mentioned, but that the proofs or records of these discharges have been lost. Where, as it has sometimes happened, there were no ancient documents to support a presumption of this kind, it was necessary to carry back the modern evidence a considerable way; and it was required that it should be so clear and uniform as to satisfy the court that, in acting upon the presumption, they were supporting an usage of considerable antiquity. And it seems, from later cases, that it might have been laid down generally, that if lands could be proved to have been exempt beyond time of memory, and that exemption might in any way have had a legal origin, such exemption would have been affirmed.[f] It will be obvious that in all these cases there can very seldom be direct evidence of the exemption of lands while they were part of the possessions of a monastery or privileged order, and it having been established that the presumptive evidence before mentioned was sufficient, all the cases have been decided upon that ground; and the principle is so abundantly clear, that it would appear useless to mention any of the great number of cases decided upon their own particular circumstances, but adding nothing important to the general rule.

Crown lands exempt from tithes.

The king, in his ecclesiastical character, may not only prescribe to be discharged from payment of tithes, but he is capable of receiving payment of tithes; so that in those places which are not within any parish, as in forests and the like, the king is entitled to the tithes; and this point was resolved in parliament in the 5th Edward III. in a suit between the crown and the Bishop of Carlisle, who claimed the tithes of the forest of Inglewood.[g] And if the lands are within a forest, and also within a parish, and in the hands of the king, they do not pay tithes, neither do

[e] *Pritchett* v. *Honeyborne*, 1 Y. & J. 149.
[f] *Monk* v. *Huskisson*, 1 Sim. 280.
[g] 2 Rep. 44 a; 2 Inst. 647; 1 Roll. Ab. 657; Cruise's Dig. tit. xxii.

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they pay tithes in the hands of the king's lessee; but that privilege does not extend to his feoffee, so that, if he grant such lands to a subject, they would immediately become liable to the payment of tithe.

But not in the hands of a subject.

Spiritual persons or corporations may prescribe to be discharged generally, so that no tithe shall be paid of their lands, nor any recompence for them; but without such prescription they would not be discharged generally. It is a maxim of law, that *ecclesia decimas non solvit ecclesiæ;* and a spiritual person may prescribe *in non decimando* for himself, his farmers and tenants, and also for his copyholders, for it is to be presumed that the spiritual person has greater fines and rents.[h]

Spiritual corporations may prescribe *in non decimando.*

So the rector or parson of a parish is not liable to the payment of tithes to the vicar, nor the vicar to the rector. And a lay rector is also exempted from paying tithes to the vicar out of the glebe so long as he holds it in his own hands; but upon the death of the spiritual or lay rector, or of the vicar, his executor is liable to the payment of tithes out of the growing crop. But this rule, as to non-payment of tithes between a rector and vicar, merely applies to the case of a rector and vicar of the same church and parish, where the *ecclesia* would be paying tithes to itself; as where the rector or vicar is in possession of glebe, neither shall pay tithe to the other in respect of such occupation; in all other cases ecclesiastical persons must prescribe *in non decimando,* and prove their prescription as we have already mentioned;[i] but if such prescription or exemption is not proved, a parson or vicar having glebe in any other parish than that in which the church is situated, to which it belongs, must pay tithe to the incumbent of that parish wherein the glebe lies,[k] for that sort of privilege, as was said by Richards, C. B., is confined to clergy of the same parish.[l]

Rectors and vicars of the same church are exempt.

Exceptions to this rule.

It has been constantly held that land having no discharge in itself, that is, for which no prescription *in non decimando* could be established, is discharged *only in the hands of the ecclesiastical owner,* under the maxim *ecclesia decimas non solvit ecclesiæ,* a maxim which is binding so long as the land is actually held by an ecclesiastic; but if it is transferred into the hands of laymen, it becomes liable. It was therefore held that the lessee of Trinity College, Cambridge, who occupied glebe land, was not exempt from the payment of tithe to the vicar; for the privilege in such

The exemption is only valid while the lands are in the hands of the ecclesiastical owner.

[h] See 2 Eagle on Tithes, 227, 228; Cro. Eliz. 479; Wats. 513.
[i] 1 Rolls. Abr. 653. [k] Wats. Cl. L. 505.
[l] *Warden of St. Paul's* v. *The Dean,* 4 Price, 65.

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cases, being only personal, does not travel from the parson to the lay lessee.[m]

Lands vested in churchwardens not exempt.

In the maxim *ecclesia decimas non solvit ecclesiæ*, the word *ecclesia* signifies ecclesiastical persons and bodies only, and not the fabric of the church; so that lands vested in the churchwardens, and settled for the repairs of the church, are not exempt from payment of tithes.[n]

Effect of commutation to rent-charge upon contingent liability to tithe.

It remains to be seen in what manner the lands which by any of the means mentioned under this head are exempted from tithes are to continue exempt from the payment of tithe rent-charge. For it will have been observed that, in many of the cases here mentioned, the exemption is not absolute, but contingent upon particular circumstances; the exemption from tithe rent-charge therefore will be contingent in the same manner. Thus as glebe, for example, under ordinary circumstances, is liable to tithe whenever it is not in the hands of the owner, so it must be subject to a contingent rent-charge after the tithe of a parish has been commuted.

In the form, therefore, of every parochial agreement for a voluntary commutation of tithes, there must be set forth what lands of the parish are or have been exempt from the payment of any and what tithes, and under what circumstances.[o] The tithe rent-charge upon these lands must be valued in the manner provided for in compulsory agreements, in which it is directed that the tithes of these lands, since they cannot be valued according to the ordinary method prescribed for computing the value of tithes in general, are to be valued according to the average value of the tithes of lands of a like description and quality in that parish and the neighbouring parishes, or as near thereto as the circumstances of each case may in the judgment of the commissioners require, and the value so estimated is to be added to the value of the other tithes of the parish.[p] In the apportionment of the rent-charge among the different owners, the amount so fixed for each of such lands, if they have been included in the valuation, will be apportioned on them respectively, but will remain as it were *dormant*, and will only become payable under the circumstances under which we have before seen the lands would have become liable to tithe; so that such lands may in each case have the full benefit of any exemption from or non-liability to tithes relating to them; and so that where any lands were exempted from tithes while in the occupation of the owner, by reason of being glebe or heretofore parcel

[m] *Lagden* v. *Flack*, 2 Hagg. Cons. R. 308.
[n] 1 Roll. Abr. 653.
[o] 6 & 7 Will. 4, c. 71, s. 21.
[p] Sect. 43.

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of the possessions of any privileged order, the same lands shall in like manner be exempted from the payment of the rent-charge apportioned on them whilst in the occupation of the owner.[q]

Section 3.

Discharge of Lands from Payment of Tithes by Compositions Real.

A real composition is where an agreement is made between the owner of lands and the parson or vicar, with the consent of the patron and ordinary, that his lands shall in future be freed from the payment of all tithes, in consideration of some land, or other real recompence, given to the parson or vicar in lieu and satisfaction of such tithe.[r] This kind of composition was formerly permitted because it was supposed that the clergy would be no losers by it; as the consent of the ordinary, whose duty it was to take care of the church in general, and of the patron, whose interest it was to protect that particular church, were both required to render the composition effectual. And such consent was in some cases presumed: as where evidence was given that the deed establishing the composition real once existed, but the deed could not be found, it was presumed that the necessary parties had executed it, and that the proper consent had been given.[s] In this manner have arisen all such compositions as exist at this day by force of the common law. But experience showing that even this caution was ineffectual, and the possessions of the church being by this and other means every day diminished, the disabling statute 13 Eliz. c. 10, was passed, by which it was enacted, that no parson or vicar should make any conveyance of any lands, tithes, tenements, or other hereditaments, being parcel of the possessions of their churches, to any persons, except leases for twenty-one years, or three lives.[t] And though there have been several decrees made by courts of equity to confirm compositions made with the consent of the parson, patron, and ordinary, subsequent to the stat. 13 Eliz., still they were not held to be binding on the succeeding incumbents, even where clearly for their benefit; of which it is supposed the following case is the strongest instance that could be adduced.

Nature of a real composition.

Restrictions as to.

To a rector's bill against occupiers of lands for an account

[q] Sect. 71.
[r] 2 Inst. 490.
[s] *Sawbridge* v. *Benton*, 2 E. & Y. 400; *Thorpe* v. *Mattingley*, 3 Y. & C. 1.
[t] Cruise, Dig. B. Tithe, 22; Black. Com. b. ii. c. 3.

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of tithes, the defendants by their answer set up an ancient agreement between a former rector of the rectory, and the then owner of the lands occupied by the defendants, and who was also the patron of the living; by which agreement certain lands enjoyed by the present rector were allotted to the rector in exchange for his glebe lands, which were then dispersed in the common fields, and a rent-charge of 40*l.* a year was granted to the rector; in consideration of which exchange and annuity, the lands occupied by the defendants were discharged from tithes. The defendants proved that the agreement was not only approved by the then bishop of the diocese, but had been established by a decree of the Court of Chancery, and had been acted upon for upwards of a century; and that the arrangement was not only beneficial to the rector at the time when it was entered into, but that it was so with reference to the probable future increase in the value of the tithes; and that it was advantageous to the plaintiff at the time of the filing of the bill: it was held, however, that the agreement was absolutely void under the disabling statutes; and that, being void, the decree of the Court of Chancery could not give it validity; and an account of the tithes was decreed.[u]

If confirmed by courts of equity are now valid.

But now, since the 9th of August, 1832, every composition for tithes which may have been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which has not been since set aside, abandoned, or departed from, is, by the stat. 2 & 3 Will. IV. c. 100, confirmed and made valid in law, and consequently binding upon all succeeding incumbents.

It was before observed that the operation of this act was suspended for a year after it had been passed, and the case last cited was one where the rector had availed himself of that time to file his bill; it is precisely one of those cases to which the last-mentioned provision of that act applies; and, as it was said by Alderson, B., in giving judgment, there is no question that such an agreement may *now* be valid under Lord Tenterden's Act.

A composition real, or grant of tithes made by a vicar, who was originally endowed with the tithes, to the lord of a manor, in consideration of his finding a priest to officiate in a chapel, and rendering certain benefits to the vicar, in the year 1536, which was previously to the stat. 32 Hen. VIII. c. 7, giving laymen a right to recover tithes, and supported by evidence of constant perception and compliance with the conditions on which it was made, was held to be valid,

[u] *Thorpe* v. *Mattingley*, 3 Y. & C. 1.

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though it was not proved to have been made with the consent of the patron and ordinary, the court presuming, from the particular circumstances of the case, that all the necessary consents had been given.[x]

Compositions real where there has been no decree of a court of equity.

The statute only refers to cases of real compositions where there has been a decree of a court of equity; where that has not been the case, in order to establish the validity, evidence must be given of such deed or agreement in writing between all the proper parties, previous to the stat. 13 Eliz. c. 10, and it would not be sufficient to prove that the payment in lieu of tithes commenced before that time, founded on an agreement which might have been by parol, and merely personal between the rector and the parishioners only.[y] It is not absolutely necessary to produce the deed or agreement itself; but, if not produced, the evidence must prove that it once existed; and where the evidence rests on reputation, such reputation must be distinctly of payments having been made under such a deed; and that those payments had their origin under an instrument made within time of memory,[z] otherwise it would only be evidence of a prescriptive payment; and usage in such a case is not sufficient; for though that is in general a ground for presuming deeds, even against the crown, yet in the particular instance of composition for tithes, it is settled, that where the deed cannot be produced, some evidence must be given referring to the deed, or showing that it did exist, independent of mere usage; and the reason why this has been so held is stated to be, that, if it were otherwise, the church would be defrauded, and every bad modus turned into a good composition.[a] The presuming a deed from long usage is an invention, for the sake of peace, where there has been a long exercise of an adverse right. For instance, it cannot be supposed that any man would suffer his neighbour to obstruct the light of his windows, or to use a way with carts or carriages over his lands for twenty years, unless some agreement has been made between the parties to that effect, of which the usage is evidence. But with respect to a compensation for tithes, the same reason does not obtain, because temporary agreements are made and continued for the convenience of parties during a succession of incumbents. There is no exercise of an adverse right, which is generally deemed necessary to raise the presumption;[b] and indeed if such presumption were raised

Evidence of.

[x] *Ridley* v. *Storey*, 3 E. & Y. 918.
[y] *Bennett* v. *Skeffington*, 4 Price, 143.
[z] *Hewes* v. *Swain*, 2 Cox, 179.
[a] *Heathcote* v. *Mainwaring*, 3 Br. C. C. 217; 2 E. & Y. 366.
[b] Shelford on Tithes, 169.

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from an usage which is only adverse to particular incumbents, it would directly contravene the maxim, *Nullum tempus occurrit ecclesiæ*, which, previously to Lord Tenterden's Act, was always held to be good.

It may be inferred that clear proof of the possession, and enjoyment of lands in lieu of tithe, would be received as presumptive evidence of a composition real: as in a case[c] where a real composition of five acres, called tithe acres, in lieu of the tithes of a meadow of 200 acres, was set up, Lord Hardwicke said, it is very reasonable to suppose that the denomination tithe acres arose from the five acres having been set apart from the rest in lieu of tithes. But this, it must be remembered, is only another mode of proof; and does not alter the necessity of proving that it existed previous to the stat. 13 Eliz.; for as it was said in another case,[d] where this mode of proof was attempted, "If any conveyance had been made, it might have been subsequent to that statute, and therefore not binding."

Distinctions in proof of a modus or of a composition real.

From what has been already said, it will be observed that there must sometimes be much difficulty in distinguishing between the case of a composition real and a modus; for, as it has been observed, they are the same things in their nature and substance. A composition real, however, must have had its origin within the time of legal memory; a modus must have existed from time immemorial. A composition real must be proved by a deed, or evidence of the existence of a deed; a modus is proved from immemorial usage only.[e] And now, since the recent statutes, in order that land should be discharged from the payment of tithes, by a composition real in lieu of them, it seems necessary that a deed or agreement should be proved of such a kind, and in such a manner, as we have mentioned, existing previous to the 13 Eliz.; or that a decree in Chancery should have been made, to which all proper persons were parties, and which has not since been set aside or departed from. If neither of these circumstances could be proved, it seems that the statute 2 & 3 Will. IV. c. 100, providing for the exemption of lands from tithes by nonpayment, would not be applicable to cases where the nonpayment had been on account of a composition real, for whatever length of time it might have existed; for as that would have been, and must be proved to have been, by deed or agreement, it would be one of the cases excepted from the operation of that statute, since it would be proved that the exemption was enjoyed by consent or

[c] *Sawbridge* v *Benton*, ante.
[d] *Chatfield* v. *Prym*, 1 Price, 253.
[e] Shelford Tithes, 168.

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agreement, expressly made or given, for that purpose, by deed or writing.[f]

Section 4.

Discharge of Lands from Payment of Tithes by private Acts of Parliament in particular Cases.

Inclosure acts.

Lands may be, and frequently have been, permanently exempted from the payment of all tithes by special acts of parliament, which of course override all general law, and depend entirely upon the circumstances of each particular case. Thus in many of the modern inclosure acts, the lands inclosed are for ever freed and discharged from the payment of all tithes, and a portion of land is allotted to the spiritual or lay rector, or to the vicar, their successors or heirs, as the case may be, in lieu of them.[g]

Where common lands had been thus inclosed and allotted, and a portion had been allotted to an estate which was clearly tithe-free, *i. e.* of which the owner had purchased the tithes from the lay impropriator, the land allotted to him was held to be tithe-free also; and that the lay impropriator who had sold the tithes of the estate, could not be entitled to the tithes of land allotted to the owner of that estate in lieu of a right of common which was appurtenant by custom to the land; for in this case no tithe would have been payable by the owner of the estate for his cattle feeding upon the common land before the inclosure act, and that act could not create a right which did not exist previously.[h]

Corn-rent substituted.

In some other acts of this kind a corn-rent has been substituted in the place of tithes, and several private acts have been passed for the express purpose of commuting tithes for a corn-rent.

Number of private acts passed for exempting lands from tithes.

In pursuance of an order of the House of Commons in December, 1831, a return was made of the several parishes in England and Wales, in which commutation of the whole great or small tithes of such parish had been authorised under any act of parliament, distinguishing the cases in which allotments had been assigned in lieu of such tithes from those in which corn-rents had been made payable; and further specifying in each case whether the tithes so commuted were the property of the clerical rectors, of impropriators, or of vicars. This return contained a chronological list of upwards of 2000 acts containing clauses

[f] 2 & 3 Will. 4, c. 100, s. 1; and see *Salkeld* v. *Johnson*, ante.
[g] Cruise's Dig. tit. xxii. [h] 5 Barn. & Ald. 22.

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for the commutation of tithes, from the year 1757, 30 Geo. II. to the year 1830, the end of the reign of Geo. IV. The above return does not contain the unprinted acts, nor about thirty inclosure acts not in the collection of the House of Commons. A further return has been made from the inclosure and other private acts, in which provisions are included for the commutation of tithes, of the proportion in lands, yearly money payments, and corn-rent allotted in lieu of tithe; distinguishing the old inclosures, the open field lands, and the commons, and the proportions for tithe allotted in the case of each description of land.[i] Several of these private acts, however, only affect the tithes of lands intended to be inclosed, and not the whole of the tithes of the parish.[k]

All these commutations under acts of parliament are not in any way altered or affected by the recent act for commutation of tithe, but in each case still depend upon the provisions in the particular acts under which they may have been made, being expressly excepted from the operation of the general act.[l]

Section 5.

Discharge of Lands from Tithes by some established Modus Decimandi.

Definition of a modus.

A *modus decimandi*, commonly called by the simple name of a modus only, is where there is by custom a particular manner of tithing allowed different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as two pence an acre for the tithe of land; sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him; sometimes that in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs, and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi* or special manner of tithing.[m]

By the common law, a modus, like every other prescriptive right, is supposed to have commenced before the time

[i] Shelford on Tithes, 276; Sess. Paper, No. 488.
[k] See the above return.
[l] 6 & 7 Will. 4, c. 71, s. 90.
[m] 2 Black. Com. 29.

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of legal memory, or the first year of the reign of Richard the First, A. D. 1189; and if it could be proved either by extrinsic evidence, or by intrinsic evidence appearing from the modus itself, to have commenced subsequently to that time, it would be bad. A modus, moreover, is always presumed to have commenced by deed, because the consent and confirmation of the patron and ordinary must have been necessary; but unlike the case of a composition real, it is unnecessary to prove the existence of the deed, or that it ever did exist; but after the constant annual payment in lieu of tithes from time immemorial, a legal commencement will be presumed.[n]

What will be presumed as to.

The following are the leading rules which are essential to the establishing a valid modus, and with each and every of which the modus must comply, or it will be bad, carrying with it intrinsic evidence of its invalidity.

Leading rules as to validity of a modus.

1. It must be certain and invariable.
2. The thing given in lieu of tithes must be beneficial to the parson and not for the benefit of a third person only.
3. It must be something different from the thing compounded for.
4. It must be a payment for that particular species of tithe which it pretends to be in lieu of.
5. It must be in its nature as durable as the tithes discharged by it.
6. It must not be rank.[o]

1. It must be certain and invariable: that is, certainty of the recompence given, certainty of the thing for which the recompence is given, and also certainty of the person to whom it is given, are necessary; and the payment of different sums, or to different persons, will at once prove it to be no modus; for it must originally have been a composition by which something fixed and invariable must have been determined on. An uncertain or fluctuating payment, or, as it is called in legal language, a desultory or leaping modus, could never have been settled from time immemorial;[p] as, for example, a modus to pay a tithe penny or a penny *per annum*, or thereabouts, for every acre of land, would be void,[q] since a certain right cannot be taken away by substituting a precarious compensation. And so a modus of one penny payable by every occupier of land in lieu of the tithe of hay, is bad, for there may be the same number of houses and inhabitants, but the land may be at one time in the occupation of many per-

Must be certain and invariable.

Examples.

[n] 2 P. W. 573; *Grant's case*, 2 Mod. 321.
[o] 2 Black. Com. 30.
[p] Toller, 184.
[q] *Chapman* v. *Monson*, 2 P. W. 572.

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sons or of one. By turning all the land into meadow, and consolidating it in one hand, the clergyman's income would be reduced to a single penny.[r] Such uncertainty is fatal to the validity of a modus, because it renders the clergyman's income precarious, shifting and desultory; changing with every change of occupation; depending not on the cultivation, but upon the acts of parties whose interest is opposite to his, and who by an easy contrivance may reduce the amount of payment. And for the same reason it has frequently been decided that moduses regulated or computed by the value or improved yearly rent of land, are void for uncertainty. The leading authority upon this point is *Startup* v. *Dodderidge*,[s] in which case it was decided that a custom to pay two shillings in the pound of the true improved yearly rent of land in lieu of the tithes of it, is void, as well as a custom to pay a proportion of the true improved yearly value; and the reasons given were, that the land might be unlet, and then no tithes would be paid; or it might be let at an undervalue, with a fine, and then the parson would be cheated; and in case the lands remained unlet, there was no person to determine the value. And in another case a custom to pay one shilling in the pound, and so in proportion, upon the yearly rent of lands let at their full value, and according to the yearly value of such lands as are not let at the full value, in lieu of hay, lambs and all other small tithes arising on such lands, was held to be a void modus in law, upon the ground of uncertainty, and because it was impossible that the parson could ascertain the value without annual and constant suits.[t]

And as to certainty of the person to whom it is to be paid, a modus alleged to be payable to the parson or vicar, or to the parson or curate, would be void by the same rule.[u]

But a modus is not considered uncertain and variable because it is not invariably payable; for lands may sometimes, and in certain conditions, be liable to tithes in kind, and at other times to a modus; and therefore where the parson must always have either his modus or his tithes, there is not such uncertainty as will avoid the modus; but each party has alternately a benefit; as if there is a modus for hay on a certain piece of land which is sown with corn, the parson will be entitled to tithes in kind of the corn, but the modus will revive when the land is again cultivated with hay.[x]

[r] *Travis* v. *Ostan*, 7 Bro. P. C. 49, 2nd edit.; 3 Wood, 522; Gwill. 1066; 3 E. & Y. 1248.
[s] 2 Ld. Raym. R. 1158; 1 E. & Y. 666.
[t] *Bean* v. *Lee*, 1 Wood, 537.
[u] *Wheildon* v. *Harvey*, 2 E. & Y. 60.
[x] *Brown's case*, 1 E. & Y. 203.

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What is given in lieu of tithes must be beneficial to the parson.

2. The thing given in lieu of tithes must be beneficial to the parson, and not for the benefit of third parties. Thus a modus to find straw for the body of the church is invalid; for as the parson is not bound to find straw for such a purpose, it is no benefit to him that the straw is found by any particular person.[y] But it is said, that if it had been alleged that the straw was given to him, and that he had bestowed it upon the church, or that he had a seat in the body of the church, it would have been good.[z] But, perhaps, the best illustration of this rule is, that a modus to repair the church, in discharge of tithes, is not good, as being an advantage to the parish only; but that a modus to repair the chancel is good, as being what the parson would otherwise be bound to do, and therefore a benefit to him.[a] And a custom that the parson shall enjoy a right of pasturage or of common of pasture in certain lands, and an annual sum in lieu of tithes, was held good.[b]

Must be different from the thing compounded for.

3. It must be something different from the thing compounded for.

It will not be presumed that any parson would *bonâ fide* have agreed to receive a part in satisfaction of the whole that was due to him, and a modus of less than what is due of the same species of tithe is consequently bad; as, for example, one load of hay in lieu of all tithe of hay, or a certain number of sheaves of corn in lieu of all tithes of corn;[c] but if the modus were to pay the tithes to the parson in some manner more beneficial than would by law be required, then, although the parishioner pays less than the tenth, the objection would not apply.[d] And so if the modus were some fixed and invariable amount of produce, to be paid at all events, whether the parishioner might happen to have in each year a greater or less quantity, or even none of that species of produce, the objection would not be applicable; for this is, in fact, a case of the same kind as last mentioned, where the tithe is paid in a manner more beneficial to the parson than the law requires, and it will be presumed, that according to the original agreement it may have been so.[e]

As an example of this rule, it may be mentioned, that although a modus to pay thirty eggs of the produce of a

[y] *Scorey* v. *Baker*, Cro. Eliz. 276. [z] Ibid.

[a] *Chapman* v. *Bishop of Lincoln*, 2 E. & Y. 17; 1 Roll. Abr. 649; Toller, 197.

[b] *Murthwaite* v. *Pearce*, 1 Wood, 234; *Bowles* v. *Lord Arundel*, 1 Wood, 508.

[c] *Penrose* v. *Shepherd*, 1 E. & Y. 448.

[d] 2 Eagle on Tithes, 134; *Austin* v. *Lucas*, 1 E. & Y. 142.

[e] 2 Eagle on Tithes, 232.

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man's own hens, in discharge of all tithe of eggs, would be void, as that number may not be the tithe of all his eggs; yet a modus to pay thirty eggs for the tithe of all the eggs a man may happen to have, would be good; for whether he happened to have more or less, or even if he had no hens, the modus would nevertheless be payable.[f]

Must be a payment for that kind of tithe which it is in lieu of.

4. It must be a payment for that particular species of tithes which it pretends to be in lieu of; as a modus of one penny for every milch cow will discharge the tithe of milch kine, but it would not discharge the tithe of barren cattle, for tithe is of common right due for both; and, therefore, a modus for one shall never be a discharge for the other.[g]

Must be durable as the tithe discharged.

5. It must be in its nature as durable as the tithes discharged by it; for tithe in kind, for which the land may always be resorted to, is a certain inheritance, and cannot therefore be rightfully extinguished by a less certain recompense:[h] thus a modus for every inhabitant of a house to pay four-pence a year in lieu of the owner's tithes is bad, for possibly the house may not be inhabited, and then the recompence will be lost.[i] It is however sufficient if the recompence is certain to all ordinary intents and purposes, as a modus payable by all the inhabitant householders of a parish is good, though liable to the possible reduction of that class, which is too remote a contingency to render the modus void.[k]

Payment by inhabitants generally.

The distinction in these cases is evident and simple. A payment by the inhabitants of certain houses in the parish is bad, because those houses may decay, and may not be rebuilt; and as the modus depends upon their existence, it is not therefore certain as to durability; but a payment by all the inhabitants in the parish is as liable to increase as to decrease, and it cannot be decreased by consolidating the lands in the hands of one person, but depends upon the number of the inhabitants. And there is a clear distinction between a case of this kind and that somewhat similar, which we have already mentioned under the first rule; for that was a penny payable by every occupier of land within the parish; and if the land had been taken away from the house, the inhabitant of the house paid nothing, and the occupier of the land to which it was added paid no more than before, so that the recompence might have been reduced to a single penny; but in a payment by the inhabitants, this could not have been the case.

[f] 1 Roll. Abr. 648, pl. 3; Bacon's Abr. Tithes, R.
[g] 2 Black. Com. 30. [h] Ibid. [i] Toller, 202.
[k] *Hardcastle* v. *Smithson*, 2 Atk. 246.

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Must not be rank.

6. It must not be too large, or, as it is commonly called, rank; as if the real value of the tithes be 60*l.* per annum, and a modus is suggested of 40*l.*, this modus will not be established, though one of 40*s.* might have been valid.[l] Indeed, properly speaking, the doctrine of rankness in a modus is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law. For in these cases of prescriptive or customary moduses, it is supposed that an original real composition was anciently made, which being lost by length of time, the immemorial usage is admitted as evidence to show that it once did exist, and that from thence such usage was derived. Now time of memory hath been long ago settled to commence from the beginning of the reign of Richard I.,[m] and any custom may be destroyed by evidence of non-existence in any part of the long period from that time to the present. Wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the modus set up is so rank and large, as that it, beyond dispute, exceeds the value of the tithes in the time of Richard I., this modus is (in point of evidence) *felo de se*, and destroys itself. For as it would be destroyed by any direct evidence to prove its non-existence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later origin.[n]

What moduses would be rank.

This rule may at first sight appear strange; but it must be remembered, that although the modus may be too large as such, yet it would always be far less than the actual value of the tithes; as moduses of 4*s.* or 5*s.* for every acre of wheat; of 2*s.* for every acre of lent corn, have been held bad for rankness;[o] 3*d.* in lieu of the tithe of lambs; 8*d.* for every colt; 3*d.* a-year for every cow, and 6*d.* for every calf, in lieu of tithes of cows, calves and milk; 8*d.* an acre in lieu of tithes of hay, &c., have been held not too large or rank.[p] But no positive rule could be laid down in such cases; for, in fact, rankness, as it has been said, is not weighed in very nice scales;[q] and other considerations, besides those of mere value, may fairly be supposed to have operated on the parties; and as the

[l] 11 Mod. Rep. 60; 2 Black. Com. 30.
[m] 2 Inst. 238, 239; Litt. 170; 2 Roll. Abr. 269, pl. 16.
[n] 2 Black. Com. 31.
[o] *Gale* v. *Carpenter*, 3 Wood, 173; 2 E. & Y. 226; *Hulse* v. *Monk*, 3 Woo[d], 211; 2 E. & Y. 234.
[p] *Bertie* v. *Beaumont*, 2 Price, 303; *Hockmore* v. *Richards*, 1 Wood, 485; 1 E. & Y. 681; *Prevost* v. *Bennett*, 2 Price, 272; 3 E. & Y. 705; *Pole* v. *Gardener*, 1 E. & Y. 675; 1 Wood, 472.
[q] *Beck* v. *Cree*, 1 Younge, 211.

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And how decided.

question of rankness is one of fact, it may in each particular case be tried and determined by a jury. There may, however, be cases in which the alleged modus is so evidently and palpably rank, that a court of equity, in a suit for tithes, would at once so decide, without putting the parties to the expense of a trial at law.[r] Again, the question might turn upon the construction of ancient documents, from which a court of equity, being more competent to draw the proper inferences than a jury, would do so, and not direct an issue.[s]

Farm and district modus.

A modus for an acre or a portion, or a whole farm, or district or tract of land, is much less liable to be affected by the question of rankness, than a modus to pay so much for particular kinds of produce, as hay, wheat, cows, lambs, &c., because the actual value of these, at any given period of history, is more readily ascertained than that of lands in any particular place, and many reasons may have prevented the tithes in general having been compounded for at their proper price; the owner may have intended a bounty for the clergyman; or he may have wished to pay for an exemption from tithes for the sake of improvements, or in order to be rid of the annoyance which that right sometimes occasioned.[t]

How modus may be discharged.

It remains only to be seen in what manner a modus, valid according to all the above rules, may be discharged. This may be by the destruction of the particular thing for which the modus is payable; as if a modus had been payable for all the tithes arising in a park, and the park be converted into tillage, the prescription is gone, and tithes in kind would become payable.[u] Not so, however, if the modus had been payable for a certain number of acres, which might happen to be a park, for then the conversion into tillage would not alter in substance the thing for which the modus was made payable.[x] Questions as to the destruction of a park modus, as may be inferred from the above examples, are generally of much difficulty and nicety. It has been observed, that where the consideration consists of venison only, the result of the authorities seems to be, that if the prescription be to pay a buck or doe generally, without any reference to deer killed in the park, the modus will continue, notwithstanding the disparking; but if the quantum of the venison be regulated by the number of deer killed in the park, as if there be a

Discharge of park moduses.

[r] *Lloyd* v. *Small*, 1 E. & Y. 746.
[s] *Fisher* v. *Lord Graves*, 3 E. & Y. 1180.
[t] See *Atkyns* v. *Willoughby de Broke*, 2 E. & Y. 406.
[u] *Muscat* v. *Price*, 2 E. & Y. 225. [x] Degge, 392.

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modus of a shoulder of every deer killed in the park, or, as it seems, if the recompence consist of a buck or doe payable out of the particular park, and the park be disparked, the modus is suspended by the act of the party himself, until the park is restored.[y]

A modus may also be discharged by the frequent payment of tithes in kind, or by neglect to pay the consideration as the modus. So at least it is laid down; but on the other hand, it is difficult to see how a custom once clearly established, and supposed to have had a legal origin, could be destroyed:[z] the question has probably never occurred in practice, and could not occur now.

Provisions as to moduses, &c. in the commutation of tithes.

The rules here mentioned as essential to the validity of a modus, although, as we shall presently see, much less likely to be useful, or be required to be applied now than heretofore, are nevertheless an essential part of the present law of tithes and tithe rent-charge. In the case of voluntary agreement for commutation of tithes, it is provided that, if there shall be any suit pending, or any question as to the existence of a modus, composition real, prescriptive or customary payment, whereby the making and executing such agreement shall be hindered, the parties, owners of the lands and tithes respectively, being parties to such suit, or interested in such question, may submit the same to a reference; which submission is to be made a rule of court, upon such terms of reference as the parties may agree upon; and the award of the arbitrator named in such reference shall, for the purposes of the act, be final and conclusive upon all parties. But no person, being the owner of an estate in lands or in tithes, having a less estate therein than of fee simple or fee tail, is empowered to submit to any such reference, so as to bind persons in remainder without the consent of the commissioners, who may at their discretion, if they think fit, direct any person in remainder, or who may be interested, to be made a party to such reference.[a] And in compulsory awards of commutation of tithes, if it shall appear to the commissioners, or assistant commissioners, that any question concerning any modus or composition real, prescriptive or customary payment, or claim of exemption from or non-liability to the payment of tithes relating to the lands in question, shall have been decided by competent authority before the making of the said award, the commissioners or assistant commissioners shall act on the principle established by such decision, and shall make their award as if such deci-

[y] 2 Eagle on Tithes, 153.
[z] See 2 Inst. 653.
[a] 6 & 7 Will. 4, c. 71, s. 24.

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sion had been made at the beginning of the period of seven years mentioned in the act.[b]

As for example, if a composition real or modus shall be set aside before the award is made, the average value of the tithes, for seven years preceding Christmas, 1835, of the lands alleged to be covered by such composition real or modus, must be taken. If the composition real or modus be established, then the amount of it must be apportioned upon the lands covered by it.[c] But if there shall be any suit pending, or any question as to the existence of any modus or composition real, or prescriptive or customary payment, in respect of any lands, or any kind of produce whereby the making any such award shall be hindered, the commissioners or assistant commissioners may appoint a time and place in and near the parish, for hearing and determining the same; and the decision shall be final and conclusive on all persons.[d] But if any person who is interested in the question, either as to the lands or tithes, is dissatisfied with such decision, he may, if the yearly payment to be made or withholden, according to such decision, exceeds 20*l.*, cause an action to be brought against the person in whose favour such decision may have been given, within three calendar months after such decision shall have been notified in writing, in such manner as the commissioners or assistant commissioners shall direct, to the parties interested therein or their known agents.[e]

Apportionment of the modus.

In the case of compulsory commutations, it is by the same act provided, that if any modus shall be payable instead of any of the tithes of the parish, the commissioners or assistant commissioners shall estimate the amount of such modus, as the value of the tithes payable in respect of such lands or their produce, and shall add the amount thereof to the value of the other tithes of the parish; so that they will be included in the total sum ascertained to be the amount of the rent-charge: but when the several sums payable come to be apportioned upon the different lands, the ascertained sum payable as a modus shall be apportioned on those lands which are covered by it; so that the several lands may have in each case the full benefit of every such modus.[f]

It will be observed that it is the necessary effect of these enactments, that during the time that commutations of tithes are taking place, questions as to moduses may very commonly arise, and occupy the attention of the courts; but that so soon as the commutations have been generally

[b] Sect. 44. [c] Shelford on Tithes, 239, n.
[d] Sect. 45. [e] Sect. 46. [f] Sect. 44.

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settled, such questions will be almost entirely at an end, and the various rules, &c., as to moduses, which we have stated above, will be rather matters of history than of practical law; for besides these provisions, it is declared by Lord Tenterden's Act,[g] already mentioned, that all prescriptions and claims of or for any modus, shall, in cases where the render of tithes in kind shall be demanded by the crown, or by a Duke of Cornwall, or by any person not being a corporation sole, or by any corporation aggregate, be deemed good and valid in law, upon evidence showing the payment or render of such modus for the full period of *thirty* years next before the time of such demand; unless the actual render of tithes in kind, or of money, or other thing differing in amount, quality, or quantity, from the modus claimed, shall be shown to have taken place at some time prior to such thirty years; or unless it shall be proved that such payment or render of modus was made by some consent or agreement, expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of *sixty* years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made by such consent or agreement as before mentioned; and where the render of tithes in kind shall be demanded by an archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, precisely the same rule as to the time which shall be a bar applies, as in the case of claims of exemption on account of non-payment, mentioned and explained above in the first section;[h] unless it shall be proved that such payment or render of modus was made by some such consent or agreement as before mentioned.[i] And with respect to this enactment, it is expressly provided in the act for the commutation of tithes, that nothing contained in that act shall revive any right to tithes, which, at the time of the passing thereof, was or thereafter might be barred by any law in force for shortening the time required in claims of *modus decimandi*.[k]

Probable infrequency of questions as to moduses for the future.

Time within which modus may be questioned.

[g] 2 & 3 Will. 4, c. 100.
[h] See ante, section 1.
[i] 2 & 3 Will. 4, c. 100, s. 1.
[k] 6 & 7 Will. 4, c. 71, s. 49.

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Section 6.

Discharge of Lands from Payment of Tithes by Rent-charge in lieu thereof.

Injustice of the old law of tithe.

There was perhaps no law to which the maxim, *summum jus summa injuria*, might more forcibly have been applied, than to the old law of tithes, which, with all its intricacies and difficulties, it was almost impossible for the generality of tithe-payers to understand, and for any breach of which notwithstanding heavy penalties were imposed; and it will be seen from what has been already said, that long before the recent statute for effecting a general commutation of tithes, the contention, trouble, and inconvenience, with which the collecting of them was attended, had in many instances induced the clergy to make large sacrifices of their rights rather than put the strict law in force, and moduses and compositions real are in fact the old forms in which voluntary commutations of tithes were formerly effected.

Commutation of tithes before the act.

In later times it became more obvious that the liability of the farmer at any time to have his tithes taken in kind, was a serious drawback on agriculture, and on the improvement and cultivation of lands. In almost every parish the tithes were practically commuted for a money payment, and a composition was entered into between the tithe owner and the tithe payers; but as the ecclesiastical rector or vicar was unable to bind his successors, such compositions were necessarily liable to very considerable fluctuation upon every change of incumbency, without reference to the state of cultivation, or to any other reason than the caprice of the titheowner or his surveyor.

Act for commutation of tithes.

In order to obviate this inconvenience, an act of parliament was passed in the 6th and 7th years of Will. IV.,[1] the object of which was, in the first place, to encourage and give facilities for effecting voluntary commutations of tithes; and, in the next place, to effect commutations compulsorily, where the parties should be unwilling or unable to come to a voluntary agreement; and in either case to render commutations, so made in conformity with the provisions of the act, permanent, so as to bind all subsequent incumbents. A rent-charge therefore on all lands, which were subject to the payment of tithes at the time of the passing of the above act, is now, or shortly will be substituted for the tithe of the produce of those lands; but this is in many particulars so far regulated by

Tithe rent-charge.

[1] 6 & 7 Will. 4, c. 71.

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the act, and in others so dependant on the old law of tithe, that few of the incidents to rent-charges generally will be found to apply to this. In many respects it is an entirely new species of property, of which little more is to be said than what is to be found in the acts of parliament by which it has been created; and it is sufficiently designated by the term *tithe rent-charge*.

The mode in which the change from tithe to tithe rent-charge has been or is to be effected, is obviously, in a legal point of view, of temporary interest only; or perhaps in the greater number of parishes, that interest is already past.

It would be foreign therefore to the purposes of this work, to enter fully into the subject of the law by which the actual commutation of tithes is regulated. But as no tithe rent-charge would be valid, unless in substance made and agreed upon according to certain provisions of the act of parliament, it will be useful to advert briefly to these, in order that the validity of the commuted rent-charge may in each case be tested by them.

It has been already observed, that the act provides two methods of commutation. 1. By voluntary parochial agreements. 2. By compulsory awards.

Voluntary commutation.

It appears unnecessary here to mention the different steps that must be taken in order to bring about voluntary parochial agreements. It will be sufficient to state the particulars which every such voluntary parochial agreement must contain, as essential to its validity; and—

Necessary contents of a voluntary parochial agreement.

1. It must bear date on the day on which the first signature is attached to it.

2. It must, in itself, or in some schedule annexed to it, set forth all the lands of the parish which are subject to the payment of any kind of tithes, in which should be included lands which may at any time become subject to tithes, as glebe lands, barren lands, and lands formerly the property or the privileged orders.

3. The true or estimated quantity in statute measure of these lands.

4. In what state of cultivation these are at that time; whether arable, meadow or pasture, woodland or common land, or howsoever otherwise.

5. Whether any modus, composition real, or prescriptive or customary payment, is payable instead of all or any of the tithes of such parish, and what lands or tithes are covered thereby.

6. The tithe owner to whom all such tithes, moduses, compositions or payments are payable; or if more than

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one tithe owner, then it must be distinguished to which of them each and every part of the tithes are payable, and in what right each of such tithe owners is entitled to them. As if the same person were vicar, and consequently in that character entitled to the vicarial tithes, and also entitled to the rectorial tithes, in the character of an impropriator, the sums to be paid to him in respect of each interest must be kept distinct.

7. Whether any and which lands of the parish have been, or are, under any and what circumstances, exempt from any and what tithes.

8. The amount in words at length of the sum agreed to be paid (subject to variation as after-mentioned) instead of the tithes of the lands comprised in the agreement, and instead of all moduses, compositions real, prescriptive or customary payments (if any) in respect of such lands, or the produce of them; distinguishing, if there be more than one tithe owner, the sum payable to each: and where the tithes of different lands in the parish are payable to different tithe owners, or to the same tithe owners in different rights, distinguishing the sum payable in respect of such different lands.

9. All such other particulars as the commissioners shall from time to time by any order require to be inserted therein.[m]

Forms of documents.

The tithe commissioners were by the act directed to frame such forms of agreement, or other documents, as might facilitate the purposes of the act; and, in accordance with such direction, have framed and settled certain forms which, so far as they are deemed of actual present importance, are to be found in the Appendix.[n]

Consents required to be given to voluntary commutations of ecclesiastical tithes.

In all cases where the tithes belong to an ecclesiastical corporation in right of any spiritual dignity or benefice, no such agreement as before mentioned shall be deemed to have been executed by the owner of the tithes, unless the following consent be given: (that is to say), in the case of an archbishop or bishop, the consent of the crown, signified by the lord high treasurer or the first lord commissioner of the treasury; and in the case of an incumbent of any other benefice or ecclesiastical dignity, the consent of the patron who would have been entitled to present if the living were then vacant, so that if there was an alternate right of presentation, the person entitled to the next turn would be the person to give such consent. Every such consent is to be given in writing, and annexed to the agreement.[o]

[m] Sect. 21. [n] See Append. No. 3; sect. 22. [o] Sect. 26.

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Agreement to be confirmed by the tithe commissioners.

It is further necessary, that the agreement thus made and consented to, should be executed by a sufficient number of the land owners and tithe owners of the parish, that is to say, such whose interest in the lands and tithes respectively shall not be less than two-thirds of the lands subject to tithes (two-thirds of the great tithes and two-thirds of the small tithes), and that the tithe commissioners, being satisfied that the same has been properly made, should confirm the same under their hands and seal, and add to it the date of the confirmation, and publish the fact of the confirmation, and the date of it, in the parish, as they think fit.[p]

But to be previously submitted to the bishop.

But before the commissioners so confirm any agreement relating to tithes belonging to any ecclesiastical person in right of any spiritual dignity or benefice, they must communicate the same to the bishop of the diocese for his observations and opinion, and no such agreement shall be confirmed by them, until he shall signify his approbation, or until four weeks after it has been so transmitted to him.[q]

Apportionment of the rent-charge.

When the amount of the rent-charge has been thus settled by the tithe owners and land owners, there is nothing further to be done by the former; but the owners of lands subject to tithes, or their agents present at a meeting, may appoint a valuer or valuers; and in case the majority in respect of numbers, and the majority in respect of interest, cannot agree upon the appointment, then they shall appoint such even number of valuers as shall be agreed upon, half to be chosen by a majority in respect of numbers, and the other half by a majority in respect of interest. No formal instrument is necessary for the purposes of this appointment; but it is sufficient if a memorandum of such appointment is entered on the minutes of the meeting and signed by the chairman; and when the valuers have been thus appointed, they are to apportion the total sum agreed to be paid by way of rent-charge, and the expenses of the apportionment, among the several lands in the parish, but so that in each case the several lands shall have the full benefit of every modus and composition real, prescriptive and customary payment, and of every exemption from or nonliability to tithes relating to such lands respectively, in such manner as has been already mentioned, and also having regard to the several tithes to which the lands are severally liable. The act contains other directions for the proceedings of the valuers, but these in no way affect the tithe owner.[r]

[p] Sect. 27. [q] Sect. 28. [r] Sect. 32.

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Compulsory award.

In cases where the commutation of tithes has been effected by a compulsory award, it must have been effected in the following manner. The tithe commissioners must ascertain the clear average value (after making all just deductions on account of the expense of collecting, preparing for sale, and marketing, where such tithes have been taken in kind,) of the tithes of the parish according to the

Upon an average of seven years preceding 1835.

average of seven years preceding Christmas, 1835; but if, during that time or any part of it, such tithes have been compounded for or demised to the owner or occupier of such lands, in consideration of any rent or payment instead of tithes, the amount of such composition or rent or payment shall be taken as the clear value of the tithes included in such composition, demise or agreement, during the time for which the same shall have been made; and the average annual value during these seven years thus ascertained is the sum to be awarded by the commissioners as a permanent commutation of the tithes.

Exceptions.

But it is provided that whenever it shall appear to the commissioners that the party entitled to such rent or composition shall in any one or more of the seven years have allowed and made any abatement from the amount of such rent or composition, on the ground of the same having been in any such year higher than the sum fairly payable, then such diminished amount, after making such abatement, shall be taken to have been the sum agreed to have been paid for any such year or years.[s]

Amount of rates, &c. to be added.

It is further to be observed that, in estimating the sum to be awarded, no deduction therefrom is to be made on account of any parliamentary, parochial, county and other rates, charges and assessments to which the tithes are liable; and therefore, if in any case the tithes shall have been demised or compounded for, on the principle of the rent or composition being paid free from such rates, charges and assessments, or any part thereof, the commissioners are to make such an addition on account thereof as may be an equivalent. Thus the average value of the tithes in kind for seven years preceding Christmas, 1835, or the composition during that time in lieu of them, has been made the usual criterion of their future value; but it would have been an obvious injustice in a case where so much might have depended upon the feelings of the incumbent for the time being, to have made this rule inflexible;

Power to increase or diminish sums paid on the average.

and it was therefore provided, that if notice in writing by the patron, land owners or tithe owners, whose interest in the lands or tithes of the parish should not be less than

[s] Sect. 37.

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one-half of the lands subject to tithes, one-half of the great tithes, or one-half of the small tithes, in the parish, should be given to the commissioners, that the average value to be ascertained as above would not fairly represent the sum which ought to be taken for calculating a permanent commutation, the commissioners might diminish or increase the sum to be so taken by a sum not more than one-fifth of such average value. But there was also a further provision, that if any case should appear to the commissioners to be fraudulent or collusive, or which, on account of the length of time which might have elapsed since the making the composition then in force, or of the peculiar interest in the lands and tithes of the parties to such composition, or of any other special circumstances, ought in the judgment of the commissioners to be separately adjudicated on, the same should be reserved for separate adjudication. In cases of such separate adjudications the commissioners shall award the rent-charge to be paid as a permanent commutation for tithes, having regard to the average rate which shall be awarded in respect of lands of a like description and similarly situated in the neighbouring parishes. But such intended award is to be deposited in the parish; and the commissioners or assistant commissioners are to hear and determine all objections to it, and may amend the draft if they think fit accordingly.[t]

Cases for separate adjudication.

Proceedings in.

When all suits and differences shall have been determined, and the total value ascertained, the commissioners or assistant commissioners are to frame the draft of an award which shall declare the amount of the rent-charge to be paid in respect of the tithes of the parish; and such award must contain all particulars which are before directed to be contained in a voluntary parochial agreement.[u]

Award.

Contents of.

A copy of the award thus made is to be deposited in some convenient place within the parish, where all parties interested may have access to it; and a day for a meeting to hear objections to it is to be appointed by the commissioners; such meetings may be adjourned from time to time, and the commissioners, in consequence of objections then raised, may, if they think fit, amend the award.[x]

Deposit of, and objections to.

As soon as the commissioners or assistant commissioners shall have made such amendments in the draft of the award as to them or him shall seem necessary, they or he shall cause the same to be fairly written, and shall sign and send it to the office of the commissioners; and the commissioners shall satisfy themselves that all the proceedings incident to the making of it have been duly performed;

Must be confirmed by the commissioners.

[t] Sect. 39. [u] Sect. 50; and see ante. [x] Sect. 51.

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and if they shall think that the award ought to be confirmed, shall confirm the same under their hands and seals, and shall add to the award the date of such confirmation, and shall publish the fact of such confirmation and the date thereof in the parish, in such manner as to them shall seem fit; and every such confirmed award shall be binding on all persons interested.[y]

And is then binding.

Apportionment.

As soon as the commissioners shall have confirmed any such award, the tithe owner has no direct interest in the further proceedings; but the commissioners or some assistant commissioner shall call a parochial meeting of the owners of land subject to tithes in the parish, for the purpose of choosing valuers to apportion the amount so awarded among the lands of the parish, and shall give notice thereof in writing under their or his hand, to be fixed at the least twenty-one days before such meeting on the principal outer door of the church, or in some public and conspicuous place within the parish; and valuers or a single valuer may be chosen at such meeting by the land owners then present in like manner; and the valuers so chosen shall act with the same powers and be subject to the same provisions as if the rent-charge so awarded had been agreed to at a parochial meeting of the land owners and tithe owners of the parish, and the valuers had been thereupon chosen in the manner we have already mentioned.[z]

When the apportionment may be made by the commissioners.

If upon the expiration of six calendar months after the day of the date of the confirmation of any agreement or award, no valuer or valuers shall have been appointed, or the apportionment by such valuers or valuer shall not have been made and sent to the office of the commissioners, it shall be lawful for the commissioners, or some assistant commissioner, to apportion the rent-charge previously agreed or awarded to be paid among the lands of the said parish, having regard to the average tithable produce and productive quality of the said lands, according to the discretion and judgment of the commissioners or assistant commissioners, but subject to the provisions to be presently mentioned, and so that the several lands may have the full benefit in each case of every modus, composition real, prescriptive and customary payment, and of every exemption from or non-liability to tithes relating to the said lands respectively, and having regard to the several tithes to which the said lands are severally liable.[a]

Particulars of an apportionment.

The form of the apportionment does not differ whether it be the case of a voluntary parochial agreement or of a

[y] Sect. 52. [z] Sect. 53. [a] Sect. 54.

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compulsory award. In either case the following particulars must be contained in it.

1. Whether it is founded on a voluntary parochial agreement or on a compulsory award.

2. The names or descriptions, or the true and estimated quantity of the lands comprised therein; but in voluntary agreements these particular descriptions of the land are not necessary to be stated, and may be omitted, if three-fourths of the landowners so request.

3. The names and descriptions of the several proprietors and occupiers.

4. The nature of the land and its state of cultivation.

5. A reference, by a number set against the description of such lands, to a map or plan to be annexed.

6. The amount of the rent-charge fixed upon the several lands.

7. To whom and in what right the same is respectively payable.

8. In case of a special apportionment, the particulars of it.[b]

Awards, agreements, and apportionments not to be impeached but for substantial defects.

We have now passed briefly over the mode in which the commutation of tithes is to be effected,—a subject, as already observed, of which the interest will be only temporary; for when the agreement, award, and apportionment of which we have spoken, has been confirmed, they shall not afterwards be impeached by reason of any mistake or informality therein, or in any proceeding relating thereunto.[c] In the case of substantial defects, it might be otherwise; as if the commissioners should have determined a matter in which they have no authority; for where any tribunal determines in a matter not within its jurisdiction, the decision is a nullity.[d]

Provision for rectifying errors in awards, &c. in certain cases.

And it has been provided, that notwithstanding any parochial agreement or compulsory award may have been duly confirmed by the commissioners, yet if it shall appear to them at any period before the apportionment that by reason of fraud, or by the omission or insertion, through error, of the tithes or lands of any party thereto, or of the name of any person who, whether as tithe owner or land owner, ought or ought not to have been a party thereto, or any other manifest error, that such agreement or award would be unjust; and that if such fraud, omission, insertion or manifest error had not occurred, the commissioners would have come to a different conclusion, it shall be lawful for them, if they see fit, and at their sole discretion,

[b] Sect. 55. [c] Sect. 66.

[d] See *Attorney-General* v. *Lord Hotham*, 3 Russ. 415.

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by a separate award to rectify such agreement or award in any of the matters aforesaid in such manner as to them shall seem just. And all the provisions and powers relating to compulsory awards shall be applicable in every such case as if no such agreement or award had been made, or as if the same were made in respect of a separate district. But it is provided that in every such separate award, the matter so dealt with, and the grounds on which the commissioners have seen fit to make the same, shall be recited or set out in the draft thereof, in addition to the other particulars required to be set forth in compulsory awards. And every such award shall, in the notice of meetings for hearing objections thereto, be called "a separate award by way of supplement" to the parochial agreement or award in the parish to which such separate award relates.[e]

At any time before the confirmation of any apportionment after a compulsory award, the land owners and tithe owners having such interest respectively as is required for making a parochial agreement, may enter into a parochial agreement for the commutation of Easter offerings, mortuaries, or surplice fees, or of the tithes of fish or fishing, or mineral tithes, and all the provisions relating to parochial agreements, so far as in the judgment of the commissioners they are applicable to the subject of the proposed commutation, are to be observed and applied; but such commutation must be made payable on the same days as those fixed for the payment of the rent-charge.[f]

We now enter upon that part of the law for the commutation of tithes, which is in continuing and daily force, and by which all payments in lieu thereof are to be regulated.

Nature of the present tithe rent-charge.

The payment of a corn-rent is substituted for the tithe of the produce of the land; or rather the tithe being in the first instance commuted for and estimated at a certain money payment, that money payment is to be converted into a corn-rent; and the prices at which the conversion from money into corn is to be made, at the time of the confirmation of each apportionment, according to the provisions of the act, are 7*s.* 0½*d.* for a bushel of wheat, 3*s.* 11½*d.* for a bushel of barley, and 2*s.* 9*d.* for a bushel of oats.[g]

Varies according to the price of corn.

In the month of January in every year, the comptroller of corn returns, or such other person as may be authorised for that purpose by the privy council, shall cause an adver-

[e] 2 & 3 Vict. c. 62, s. 8.
[f] 2 & 3 Vict. c. 62, s. 9.
[g] 7 Will. 4 & 1 Vict. c. 69, s. 7.

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tisement to be inserted in the London Gazette, stating what has been during the seven years ending on the Thursday next before Christmas day then next preceding the average price of an imperial bushel of British wheat, barley, and oats, computed from the weekly averages of the corn returns.[h] And every rent-charge charged upon lands in and by the agreement, award, and apportionment, in such manner as we have mentioned, shall be deemed to be of the value of such number of imperial bushels and decimal parts of an imperial bushel of wheat, barley, and oats, as the same would have purchased at the rates or prices above mentioned, and fixed for this purpose, in case one-third thereof had been invested in the purchase of wheat, one-third in the purchase of barley, and the remaining third in the purchase of oats.[i]

Exceptions from the general mode of estimating according to price of corn.

From the general mode of commutation here mentioned there is an exception in the case of hops, fruit, and coppice woods; and the provisions in those cases are of a nature which renders it necessary to explain them in detail, for they are an essential part of the present law, and are important not only during the time of the commutation, but remain so after the commutation has been settled.

Coppices.

In case any of the lands in the parish shall be coppices, and notice shall be given by the owner thereof, or by the owner of the tithes thereof, to the commissioners or assistant commissioners acting in that behalf, that the tithes thereof should be separately valued, the commissioners or assistant commissioners shall estimate the value of the tithes thereof, with a due regard to the average value, estimated according to the best of their judgment, of coppice wood of the same kind cut during the period of seven years preceding in that parish and the neighbouring parishes, estimating the same as chargeable to all parliamentary, parochial, county, and other rates, charges, and assessments to which the said tithes are liable, and shall add the clear value of the tithes so estimated to the value of the other tithes of the parish, ascertained as aforesaid; and the commissioners shall, in the report which they are required to make to one of the principal secretaries of state before the 1st day of May, in the year 1838, lay down rules for the guidance of the assistant commissioners in estimating the value of the tithes of coppice wood; and, unless parliament shall otherwise provide, such rules shall be observed by the said commissioners and assistant commissioners.[k]

[h] 6 & 7 Will. 4, c. 71, s. 56. [i] Sect. 57. [k] Sect. 41.

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Hop grounds, orchards, or gardens.

In case any of the lands in the parish shall be hop grounds, orchards or gardens, and notice shall be given by the owner thereof to the commissioners or assistant commissioners, that the tithes thereof should be separately valued, the commissioners or assistant commissioners shall estimate the value of the tithes thereof, according to the average rate of composition for the tithes of hops, fruit and garden produce respectively, during seven years preceding Christmas, 1835, within a district to be assigned in each case by the commissioners or assistant commissioner, and estimating the same as chargeable to all parliamentary, parochial, county and other rates, charges and assessments to which the said tithes are liable, and shall add the value so estimated to the value of the other tithes of the parish.[m]

Ordinary and extraordinary charge in such cases.

The amount which shall be charged by any apportionment upon any hop grounds or market gardens in any district so to be assigned, shall be distinguished into two parts, which shall be called the ordinary charge and the extraordinary charge; and the extraordinary charge shall be a rate per acre, or less quantities of ground, according to the discretion of the valuers or commissioners by whom the apportionment shall be made. By the Tithe Amendment Act,[n] it was subsequently provided, that in case any of the lands in a parish, the tithes whereof shall be in course of commutation, shall be orchards or fruit plantations, and notice in writing, under the hands of any of the owners thereof, whose interest therein shall not be less than two-thirds of the whole of the orchards and fruit plantations in such parish, shall be given to the valuers or commissioners, or assistant commissioner, by whom any apportionment shall be made, at any time before the draft of such apportionment shall be framed, that the tithes thereof should be distinguished into two parts, the amount which shall be charged by any such apportionment upon the several orchards and fruit plantations in such parish, shall be distinguished into two parts accordingly, and the same shall be called the ordinary charge and the extraordinary fruit charge; and the extraordinary charge shall be a rate per acre, and so in proportion for less quantities of ground, according to the discretion of the valuers or commissioners, or assistant commissioner, by whom such apportionment shall be made.[o]

Newly cultivated fruit plantations to be subject to extra charge.

And all lands, the tithes whereof shall have been commuted, which shall be situate within the limits of any parish in which an extraordinary fruit charge shall have been distinguished at the time of commutation, and which shall be

[m] Sect. 40. [n] 2 & 3 Vict. c. 62. [o] Sect. 26.

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newly cultivated as orchards or fruit plantations at any time after such commutation, shall be charged with an additional amount of rent-charge per acre equal to the extraordinary fruit charge per acre in that parish: provided, that no such additional amount shall be charged in respect of any plantation of apples, pears, plums, cherries and filberts, or of any one or more of those fruits, during the first five years, and half only of such additional amount during each of the next succeeding five years of such new cultivation, and no such additional amount shall be charged in respect of any plantation of gooseberries, currants and raspberries, or of one or more of those fruits, during the first two years, and half only of such additional amount during each of the next succeeding two years of such new cultivation; and no such additional amount shall be charged in respect of any mixed plantation of apples, pears, plums, cherries or filberts, and of gooseberries, currants or raspberries, during the first three years, and half only of such additional amount during each of the next succeeding three years of such new cultivation.[p]

When extra charge may cease.

And all lands, the tithes whereof shall have been commuted, which shall be situated within the limits of any parish in which an extraordinary fruit charge shall have been distinguished, and which shall cease to be cultivated as orchards or fruit plantations at any time after such commutation, shall be charged, after the thirty-first day of December next following such change of cultivation, only with the ordinary charge upon such lands.[q]

Mixed plantations of hops and fruit.

In case any lands within the limits of a parish in which an extraordinary fruit charge shall have been distinguished, shall have been or shall at any time be planted with fruit, and also with hops, the same shall, during the continuance of such mixed plantation of hops and fruit, be liable to the extraordinary hop charge only, or to the extraordinary fruit charge only, payable in respect of the same lands, not to both those charges, and the extraordinary charge to which the lands so planted shall be liable shall be the higher of the two for the time being.[r]

When subject to separate rectorial and vicarial tithes.

Where any land, liable to any such extraordinary charge for the tithes of a mixed plantation of hops and fruit, shall, at the time of the commutation, produce both rectorial and vicarial tithes, payable to different persons, the apportionment shall set out the same, distinguishing the amount of ordinary and extraordinary charge payable to each tithe owner, and shall divide the whole acreable extraordinary charge between such tithe owners, according to the quan-

[p] Sect. 27. [q] Sect. 28. [r] Sect. 29.

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tity of land producing rectorial tithe, and the quantity producing vicarial tithe.[s]

Future mixed plantations.

In all cases in which there shall be hereafter mixed plantations of hops and fruit in any parish or district in which an extraordinary fruit charge shall have been declared, the rectorial and vicarial tithes whereof, but for the commutation, would have been payable to different owners, the extraordinary charge payable in respect of the tithes of such mixed plantation shall be divided between such owners in proportion to the extent of land occupied by that produce, which would have paid tithes to each of them respectively: provided, that payment of the share of each tithe owner, when so ascertained, shall be taken to be subject to the provisions for lessening the amount of extraordinary charge payable in respect of hop gardens and orchards respectively at the beginning of such cultivation.[t]

How such rent-charge may be fixed in certain cases.

For the purpose of fixing any charge for the tithes of hops or fruit, or of any mixed plantation as aforesaid, the commissioners may assign the parish or lands, in respect of which due notice shall have been given, or any part or parts of such parish or lands, as such district as before mentioned, and may fix a charge upon such lands in respect of the tithes of hops or fruit, as the rent-charge to prevail and to be established in respect of the same, without specific reference in the award to any other parish or lands, but having regard to the general amount of compositions which they shall find to have prevailed in other parishes of a similar description, and not to the money payments in the parish under consideration, or the value of the tithes in kind thereon.[u]

When tithe rent-charge to be payable.

In the absence of any special agreement[x] between the parties, the payment of tithe rent-charge is to begin to be due from the 1st of January next after the confirmation of the apportionment; at which time the lands are to become absolutely discharged from the payment of all tithes, and it is to be paid to the person mentioned in that behalf in the agreement or award and apportionment, in the nature of a rent-charge issuing out of the lands charged therewith; such yearly sum to be payable by two equal half-yearly payments, on the 1st of January and the 1st of July in every year; and after every 1st of January, the sum of money thenceforth payable as rent-charge shall vary so as always to consist of the price of the same number of bushels and decimal parts of a bushel of wheat,

[s] Sect 30. [t] Sect. 31. [u] Sect. 32.

[x] By the 2 & 3 Vict. c. 62, provision is made for fixing the time at which the rent-charge may be made to commence.

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barley and oats respectively, according to the prices ascertained by the then next preceding advertisement.

But that which we have already mentioned as the dormant rent-charge[y] apportioned upon any lands, which during any part of the period of seven years preceding Christmas, 1835, were exempted from tithe by reason of having been inclosed under any act of parliament, or converted from barren heath or waste land, is to be payable for the first time on the 1st of July or the 1st of January next following the confirmation of the apportionment, which may be nearest to the time at which tithes were or would have become payable for the first time in respect of the said lands, if no commutation thereof had taken place.

Parties empowered to substitute a fixed for a contingent rent-charge.

In other cases, where the rent-charge would have been dormant or contingent whilst the lands were in the occupation of the owner of them, by reason of having been parcel of the possessions of a privileged order, the respective owners of the lands and tithes, or tithe rent-charge, by the parochial agreement, or by a supplemental agreement, made as the commissioners shall approve, may agree to the payment (or, in cases of compulsory award, the commissioners, with the consent of such respective parties, may award the payment) of a fixed and continuing rent-charge, without regard to the change of occupation or manurance of such lands, equivalent in value, according to the judgment of the commissioners, to the contingent rent-charge; and such lands shall, after the confirmation of the agreement or award, or after such other time as shall be fixed, with the approval of the commissioners, be subject to such fixed rent-charge, instead of the contingent rent-charge, to which such lands would otherwise have been subject, and such fixed rent-charge is made recoverable in the same manner as other tithe rent-charge.[z]

Crown lands, which, by reason of their being of the tenure of ancient demesne or otherwise, are exempt from tithe while in the tenure, occupation or manurance of the crown, or tenants of the crown, but become subject to tithe when aliened or occupied by subjects not tenants of the crown, may in like manner have a fixed instead of a contingent rent-charge charged upon them; but no such fixed rent-charge shall be charged upon them without the consent of the persons or officers who are, by the Tithe Commutation Act, required to be substituted in cases of commutation, where the ownership of lands or tithes is vested in the crown.[a]

[y] Ante, sect. 2. [z] 2 & 3 Vict. c. 62, s. 11. [a] Ibid. sect. 12.

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Rent-charge subject to same incumbrances and incidents as the tithe.

The rent-charge, except in cases where it may be specially provided in the agreement or award, is to be subject to the same incumbrances and incidents as the tithe was prior to the commutation; so that tithe rent-charge, belonging to ecclesiastical and other persons, within the enabling and disabling statutes, will become subject to their provisions; and any person having any interest in or claim to, or charge or incumbrance upon any tithes, will retain the same in or upon the rent-charge, and the same remedies are given him for recovering it, as if his claim had accrued after the commutation.[b]

Provision where a tenant at rack rent dissents from payment.

The occupiers of land at a rack rent may dissent to the payment of tithe rent-charge; in which case the landlord may succeed to the rights of the tithe owner during the tenancy, as to the perception or collection of tithes, or receipt of any composition in lieu thereof, and may have all the powers and remedies for enforcing render and payment of such tithes or composition, as the tithe owners would have had if the commutation had not taken place.[c]

Section 7.

Discharge of Lands from Payment of Tithe by other Lands given in Lieu thereof.

Lands not exceeding twenty acres may be given in lieu of tithes.

Parochial agreement.

Another mode in which lands may become exempt from the payment of tithes, is by other lands being given in lieu of the tithe or rent-charge. This, too, is provided for by the Tithe Commutation Act; for it is there declared, that any parochial agreement may be made according to the manner and form prescribed in the act for parochial agreements as to rent-charge, for giving to any ecclesiastical owner of tithes or tithe rent-charge, any quantity of land, not exceeding twenty acres, by way of commutation for the whole, or an equivalent part of such tithe rent-charge; but in every case such agreement must be made in such form, and contain such particulars, as the commissioners shall direct, specifying the land, whereof the tithe or tithe rent-charge shall be the subject of the agreement, and giving full descriptions of the quantity, state of culture, and annual value of the lands, proposed to be given in exchange for such tithes or rent-charge. And the same consent and confirmation are made necessary to any such agreement, as in the case of an agreement for a rent-charge.[d]

[b] 6 & 7 Will. 4, c. 71, s. 71.
[c] Ibid. sect. 79.
[d] Ibid. sect. 29; and see ante.

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If the agreement does not extend to the whole of the tithes of the parish, an agreement or award is to be made in the manner before mentioned for the other lands; and unless otherwise agreed upon by the parties to the agreement, the rent-charge is to be apportioned upon all the lands of the parish, subject to the payment of tithes, except the land so given by way of commutation.[e]

When not extending to all the tithes of a parish.

So also in the case of a compulsory award, the owner of any lands chargeable with tithe rent-charge may at any time, whether before or after the confirmation of the apportionment, but during the continuance of the tithe commission,[f] and with the consent of the commissioners, agree with any ecclesiastical person, being the owner of the tithes, for giving land instead of the rent-charge chargeable upon his lands. Every such agreement is to be made under the hands and seals of the land owner and tithe owner, and to contain all such particulars as are required to be contained in a parochial agreement for giving land instead of rent-charge; and the same restrictions as to the quantity of land to be given, and as to the necessity of consent and confirmation by parties, are equally applicable to either case; and in either case also, the land so given must be free from incumbrances, except leases at improved rent, land tax, or other usual outgoings, and must not be of leasehold tenure, nor of copyhold or customary tenure, subject to arbitrary fine or the render of heriots; so that those copyhold lands only which are liable to fines certain, and free from heriots, may be taken in lieu of rent-charge.[g]

In compulsory awards.

But any amendment made in the draft apportionment before it is confirmed, and after any such agreement for giving land in lieu of rent-charge, by which amendment the charge upon the lands referred to in such agreement shall be altered, shall be taken to annul the execution of the agreement for giving land, and any consent that may have been necessary thereto.[h]

Effect of amending draft apportionment.

It was in the first instance directed, that the commissioners should satisfy themselves as to the title of the lands thus agreed to be given; but this appears now to be unnecessary; for it has been enacted, that where any land has been or may be taken by any ecclesiastical tithe owner, under any agreement by virtue of these acts, such land shall, upon the confirmation of any such agreement, vest absolutely in such tithe owner and his successors, free from all claims upon it; and without being subject to

Title of lands given in exchange.

[e] 6 & 7 Will. 4, c. 71, s. 29.
[f] 2 & 3 Vict. c. 62, s. 19.
[g] See ibid., and 6 & 7 Will. 4, c. 71, s. 62.
[h] Sect. 62.

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any question as to any right, title or claim thereto, or affecting the same.[i]

Remedy for the party who would have been entitled to recover the lands.

The commissioners are to cause to be inserted in or indorsed upon every such agreement, the amount of the rent-charge instead of which such land was given, and the lands upon which the same was chargeable, and every person who would have been entitled to recover any such land given instead of rent-charge, or any rents or profits issuing out of such land, shall be entitled instead to recover against the parties who may have given such land instead of rent-charge, his, her or their heirs, executors or administrators, by way of damages, in an action on the case, such compensation as he or she may be entitled to for any loss thereby sustained, and such damages, and all costs and expenses awarded to the plaintiff in such action, shall forthwith attach upon and be payable out of the lands exonerated by such agreement.[k]

Effect of this upon purchasers.

It would appear to follow from this enactment, that lands in the hands of a *bonâ fide* purchaser, without notice of any incumbrance, and indeed upon which no incumbrance existed, might be charged with the payment of these damages, although the owner would have been no party to the action, and would perhaps have known nothing of its commencement; this enactment, therefore, will render it necessary, or at least advisable, for any party purchasing or advancing money on mortgage of lands which have been exonerated from tithe rent-charge by other lands given in lieu of them, to investigate and be satisfied, with not only the title of those lands, but also the title of those by the giving of which the others were exonerated. It appears by the clause that the damages are not necessarily recoverable, in the first instance, against the parties defending the action; or, if so intended, it is not clearly expressed, that where the lands exonerated have passed to a purchaser, the person in whose hands they first became exonerated, or his representatives, should be primarily liable to pay the amount of the damages, for these attach forthwith upon the lands; so that the person holding them would be unnecessarily driven to a circuitous remedy of another action under his covenant for title against the vendor or his representatives. It might, however, frequently happen that the representatives of his vendor had nothing out of which he could recover; and it seems, therefore, that there should have been some provision for directing the action to be brought against the holder of the lands, or that he should be a party to it;

[i] 2 & 3 Vict. c. 62, s. 20. [k] Ibid.

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since, in such a case as we have last mentioned, the action would actually be brought against parties who had no interest in defending it, while the party who was really to be injured would have no opportunity of protecting himself.

Corporations, &c. may convey lands for this purpose.

All corporations, whether sole or aggregate, and all trustees or feoffees for any charitable purpose, who would otherwise be restrained from alienation, are empowered to make valid conveyances and assurances of lands, and to enter into all necessary agreements for the giving lands instead of tithes.

Agreement for giving lands to operate as a conveyance, &c.

An agreement for giving lands instead of tithe rent-charge, as soon as it has been confirmed by the commissioners, is to operate as a conveyance of such land to the tithe owner; and when conveyed it is to vest in and be deemed to be holden by him upon such uses and trusts in every respect as the tithes or tithe rent-charge, in exchange for which it has been given; and, for the purpose of making and completing such agreement, all persons under legal disability, such as minors, idiots, lunatics, femes covert, persons beyond sea, &c. are by their guardian, committee of estate, husband or attorney respectively, or in default thereof by such person as the commissioners may nominate for that purpose, and whom the act empowers them to nominate under their hands and seal, empowered to convey lands.

Persons under disability.

Time within which lands may be given.

It must be remembered that what is here said, unlike the mode by which the commutation of tithes to tithe rent-charge is directed, is not of temporary interest, but that at any time during the continuance of the tithe commission it may be effected, provided the directions here mentioned are observed.

Section 8.

Of the Merger and Extinguishment of Tithe and Tithe Rent-charge.

Formerly, although the tithe owner was also owner of the lands out of which the tithes were issuing, there was no mode by which a merger or extinguishment of them might be effected. Impropriate tithes were still kept distinct from the land, and, notwithstanding unity of possession, they were held under separate titles. It was, however, provided by the first Tithe Commutation Act,[1] that it should be lawful for any person seised in possession of an estate in fee simple or fee tail of any tithes, or rent-charge in

Persons seised in fee simple or in fee tail may merge rent-charge.

[1] 6 & 7 Will. 4, c. 71, s. 71.

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lieu of tithes, by any deed or declaration under his hand and seal, to be made in such form as the commissioners should approve, and to be confirmed under their seal, to release, assign or otherwise dispose of the same, so that the same might be absolutely merged and extinguished in the freehold and inheritance of the lands on which the same should have been charged. It was afterwards, however, considered desirable considerably to extend this power of merging tithe and tithe rent-charge; and it was accordingly enacted by the statute 1 & 2 Vict. c. 64, that any person or persons who should, either *alone or together*,[m] be seised of or have the power of acquiring or disposing of the fee simple in possession of any tithes or rent-charge in lieu of tithes, by any deed or declaration under his or their hand and seal, or hands and seals, to be made in such form as the commissioners should approve, and confirmed under their seal, might convey, appoint or otherwise dispose of the same, so that the same might be absolutely merged and extinguished in the freehold and inheritance of the lands out of or on which the same should have been issuing or charged.

How merger to be effected in other cases.

Every such deed or declaration is to be valid and effectual for that purpose, although the same may not be executed or made in the manner, or with the formalities, which would have been essential to its validity if the act had not been passed. And such deeds or declarations are by the same act exempted from any stamp duty.[n]

Lands and tithes settled to the same uses.

In cases where tithe or tithe rent-charge, and the lands out of which it is payable, are settled to the same uses, the tenant for life in possession is by the act empowered to merge and extinguish them in like manner and form as in the cases last mentioned.[o]

Copyhold lands.

And it is declared that the provisions for the merger of tithe and tithe rent-charge shall extend not only to freehold, but to all lands, though they should be copyhold of inheritance, or for lives, or of any other tenure whatsoever.[p]

Charges on merged tithes.

By the statute 2 & 3 Vict. c. 62, which has been commonly called the Tithe Amendment Act, it is provided that where any tithe or tithe rent-charge has been or shall be merged, the lands in which such merger shall take effect shall be subject to any charge, incumbrance or liability to which the tithe or tithe-rent charge was subject previous

[m] As where there is a tenant for life and a tenant in tail in remainder.

[n] Sects. 1, 2. [o] Sect. 3.

[p] Sect. 4. For the form of a declaration merging tithes or tithe rent-charge when the merger is effected by a separate instrument, and also for the form of a clause to be introduced into an agreement for commutation of tithes for effecting the same purpose, see Appendix, No. IV.

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to the merger; and that any such charge, incumbrance or liability shall have priority over any charge or incumbrance existing upon the lands at the time of such merger taking effect, but only to the extent of the value of such tithe or tithe rent-charge; and such lands and the owners of them are made liable to the same remedies for the recovery of any payment, and the performance of any duty in respect of such charge, incumbrance or liability, or of any penalty or damages for non-payment or non-performance thereof respectively, as the tithe or tithe rent-charge, or the owner thereof for the time being, were or was liable to previous to such merger.

All incumbrances, therefore, upon the tithe or tithe rent-charge, which is or may be merged, are not only kept on foot, but directed to be the first charge on the land, so that incumbrances upon tithe and tithe rent-charge which has been merged, appear to be in a better position than before.

It will be a consequence of the provision before mentioned, that the lands are to be charged only to the extent of the value of the tithe or tithe rent-charge merged in them, that where there are incumbrances, the tithes should be commuted for an equivalent rent-charge, before any merger takes place, in order to preserve evidence of what is the extent of such value.

May be apportioned on particular lands.

Every person who is entitled to exercise the above powers for the merger of tithe and tithe rent-charge, may, with the consent of the commissioners under their hands and seal, and of the person to whom the lands in which such merger shall take effect shall belong, either by the deed or declaration by which the merger is effected, or by any other instrument made as the commissioners shall approve, specially apportion the whole or any part of any such charge, incumbrance or liability, affecting the tithe or rent-charge merged or proposed to be merged upon any part of the lands in which the merger is effected, or upon any other lands of the same person held under the same title, and for the same estate in the same parish; or upon the several closes or portions of such lands; or according to a rate per acre upon lands of different quality, in such manner and proportion, and to the exclusion of such of them, as the person intending to merge the same may by any deed or declaration direct. But no land shall be so exclusively charged, unless its value in the opinion of the commissioners shall be at least three times the value of the amount of the charge, incumbrances, or liability charged thereon, over

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and above all other charges and incumbrances, if any, affecting the same.[q]

Merger in glebe lands.

All the before-mentioned provisions for the merger of tithe and tithe rent-charge are made to extend to glebe or other land, in all cases where the same, and the tithes or tithe rent-charge thereof, belong to the same person in virtue of his benefice, or of any dignity, office, or appointment held by him; and this will in many cases supersede the necessity of apportioning a contingent, or what we have before called a dormant, rent-charge upon glebe lands.[r]

Where copyholds are subject to an arbitrary fine, &c.

In the case of copyhold lands subject to an arbitrary fine, a fine equal to two years improved annual value may be imposed. It is provided, therefore, that where tithe or tithe rent-charge is merged in such copyhold lands, its value is to be deducted in estimating the improved annual value of the lands; for this purpose there is to be endorsed on the deed or declaration by which the merger is effected, a certificate under the hands and seal of the commissioners, setting forth the annual value of the tithe or tithe rent-charge so merged; and the production of such deed or instrument, or a duplicate thereof with the certificate endorsed, or of an office copy of such deed or instrument and certificate endorsed thereon, shall be sufficient evidence of the annual value of such merged tithe or tithe rent-charge.[s]

Extent of the power to merge.

The power therefore of merging tithe or tithe rent-charge now extends to all cases where there is unity of possession and unity of title, for an estate for life or any greater estate, or where any two persons jointly have the power of acquiring such estate.

Section 9.

Of the Rates and Assessments to which Tithes and Tithe Rent-charge are liable.

Tithe rent-charge to be valued without deduction for rates, &c.

The commissioners are directed to estimate the value of tithes, without making any deduction therefrom on account of any parliamentary, parochial, county and other rates, charges and assessments, to which tithes are liable; and whenever the tithes shall have been demised or compounded for, on the principle of the rent or composition being paid free from all such rates, charges and assessments, or any part thereof, the commissioners are to regard that circumstance, and to make such addition on account thereof as

[q] See 6 & 7 Will. 4, c. 71, s. 58; 7 Will. 4 & 1 Vict. c. 69, s. 9.
[r] 2 & 3 Vict. c. 62, s. 6. [s] Sect. 7.

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shall be an equivalent.[t] A regard to this circumstance was in fact very generally necessary, for in most of the agricultural parishes the valuation of tithes had always proceeded upon the principle of deducting from the amount to be paid the estimated amount of the rate; and this latter, being retained by the occupier, was a compensation to him for the larger amount of rate assessed upon the land held by him, in consequence of no rate being actually paid upon the tithes. This system, although irregular and informal, was probably found convenient, and worked no injustice, so long as the parish was entirely agricultural, and nothing rated but the land. But in parishes partly agricultural and partly manufacturing, or where large houses were subjected to a heavy portion of the rate, the injustice and inconvenience of such a system were obvious; for the land thereby enjoyed a benefit to which it was not properly entitled, there being nothing to compensate the householder and the manufacturer for the increased amount of rate which they had to pay in consequence of the exemption of the tithe. The system nevertheless continued to be very common, up to the time of the commutation of tithes; so much so, that in many instances the liability of tithe to the payment of any rates had been overlooked or forgotten, and many of the parochial agreements first made and sent to the commissioners contained no notice of or provision for the rates, and were consequently returned by them, in order that the sum equivalent to the rates might be added.[u]

Usual method of rating tithe formerly.

The rent-charge now payable instead of tithe is to be subject to all parliamentary, parochial, county, and other rates, charges and assessments, in like manner as the tithes commuted for such rent-charge have theretofore been subject.[x] And this consequently brings us to the consideration of an extensive subject, it being necessary to inquire fully to what rates and charges, in what manner, and in what proportions, tithes were subject previously to the commutation.

Rent-charge to be liable to same rates, &c. as tithe formerly.

With respect to the original liability of tithes to temporal charges, independently of any charges that might be created on them by statutes, it is laid down by Lord Coke, "*Nullus pro decimis quæ sunt spirituales de aliquâ reparatione pontis seu aliquibus oneribus temporalibus onerari debet.*" But he adds, that if at that day tithes were in the hands of temporal men, they are by reason of them contributory to temporal charges. The exemption at common law there-

Rates and assessments to which tithe was formerly liable.

[t] 6 & 7 Will. 4, c. 71, s. 37.
[u] See Report of the Tithe Commissioners, dated Nov. 1, 1837.
[x] 6 & 7 Will. 4, c. 71, s. 69.

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fore was not on account of the peculiar kind of property, as incorporeal hereditaments, but as being property held by ecclesiastics, and was probably, by virtue of the chapter of Magna Charta, "*Quod libera sit ecclesia.*" We derive, however, but little information from the common law on this subject, for all burdens of a public nature to which real estates are subject have been imposed by acts of parliament. This privilege of exemption, therefore, mentioned by Lord Coke, has ceased to be of any value.

Poor rate.

The first charge imposed upon real property by act of parliament, was the poor rate, created by the 43d of Elizabeth, c. 2, by which it was enacted that competent sums should be raised by the taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal-mines, or saleable underwoods in the parish, for the purposes therein specified; and it is now and long since has been fully established, that by virtue of these words all tithes are rateable to the poor. It may however be an interesting speculation, to inquire how far it is probable that this was originally intended by the statute. The distinction between tithes of the incumbent, and tithes impropriate, must at that time have been fully understood; and as the special mention of coal-mines in the statute has been always held to operate as an exception of all other mines, so the mention of tithes impropriate, and impropriations of tithe, might reasonably have operated as an exception of all other tithes; and so it would undoubtedly have been held, but for the especial mention of parsons and vicars, for it has been said by Bayley, J.,[y] "The motive for specifically naming tithes impropriate and impropriations of tithes probably was, that all other description of tithes had already been made chargeable by the words parson and vicar, and the other description of tithes were added to comprehend such as should be in the hands of laymen, and which therefore would not come in under the words parson and vicar, the object of the legislature being to include all possible descriptions of tithes in whatever hands they might be." This is in substance to say, that the parson and vicar are rateable for their tithes by implication, and because it could only be with that view that they are mentioned; but that reason could only be satisfactory, if there were no other possible property in respect of which the parson and vicar could be rateable. It is obvious, however, that they might have been named, either in respect of the glebe and the parson-

Doubts as to whether ecclesiastical tithe was originally intended to have been rated.

[y] *Rex* v. *Lacey*, 5 Barn. & Cres. 863; 5 Dowl. & Ry. 675.

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age house, or in respect of any other property which they might have happened to hold in the parish; the addition of the words "and other," would make it appear as if it were simply intended to name ecclesiastics and laymen as persons equally liable to be rated; the property in respect of which they should be rated being next more particularly specified.

If we regard the history of the period when, and the circumstances under which the poor rate was first imposed, there is every reason why the tithes impropriate, and which, previously to the dissolution of the monasteries, had mainly contributed to the support of the poor, should have been charged; but the reason does not equally apply to those tithes which, in the hands of the incumbent, might have been supposed to bear already a large share of such a burden. And as the parson was not chargeable at common law, according to Lord Coke, the words and intent of the act ought certainly to have been plain and manifest in order to charge him.

First notice of their liability.

However this may have been, it must at first have been considered doubtful whether the incumbent was rateable for his tithe under this statute; for so long afterwards as the twenty-fifth year of Charles II. we find the first mention of a case which decides that parsons are liable to the poor rate in respect of their tithes. In that case it is said by Hale, C. J., that he ought to contribute, and that so it had been held by all the judges in England in Serjeants' Inn, in the parson of Pancras's case; and that they were contributory to many other charges, notwithstanding Magna Charta.

It would seem, however, that long after the above decision the question must have been considered doubtful, or that in practice tithe must have been very commonly considered as exempt, for so lately as in the fourth year of George I., a vicar assessed to the poor rate in respect of his tithe, appealed to the sessions, and was actually discharged by them. But the King's Bench held upon appeal, that he was chargeable as vicar, and the order of sessions was quashed.

General practice of rating tithes of recent date.

In many parishes, even up to the time of the recent commutation of tithes, no poor rate had ever been paid in respect of them, and in many others, although it had been allowed for in the valuation, that circumstance appeared to have been unknown to and overlooked both by the tithe owner and the parishioners.[z] It may therefore be said that it is only since the passing of the Tithe Commu-

[z] See Report of Tithe Commissioners, note, ante.

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tation Act, that the rating of tithe to the poor has been generally well understood, and uniformly enforced.

All payments in lieu of tithes are rateable.

It being established that the incumbent is rateable to the poor in respect of his tithes, it follows that he is equally rateable in respect of a modus, composition real, or money payment in lieu of them, for the receipt of these is in fact the receipt of the tithe, with the difference only, that it is not tithe in kind.[a] And so under an inclosure act, by which the tithes are extinguished, and a sum of money is given to the rector or vicar in lieu of tithes, the money so substituted will continue rateable to the poor, on the same principle that the tithes themselves were before,[b] unless there are express words of exemption in the act to remove that rateability.[c]

Exceptions.

Agreement to the contrary.

But if at the time of framing an inclosure act, an arrangement be made between the parson and his parishioners, that the commutation rent in lieu of tithes shall be paid to him "free from all taxes and other deductions whatsoever, except the land-tax," it is a bargain which they are competent to make; and the effect of it would be that the commutation rent would not be liable to the poor rate. In such a case it was said by Abbott, C. J., "The rector contends that upon the fair construction of those words, his exemption includes payments to be made for the relief of the poor. His parishioners, on the other hand, insists that taxes and deductions are not rates, and therefore that the rector is liable to payment of the poor-rates. Now it has been decided that parochial tax means, or at least comprehends, poor rate; and I think most correctly. Is not the poor rate a tax? Would there be any thing absurd in speaking of a poor tax instead of a poor rate? I consider the former expression equally appropriate with the latter; each means merely that a certain aggregate sum is to be levied by division upon many; and the very language of the statute of Elizabeth is, that a fund shall be raised by taxation. Now money raised by taxation is a tax. The poor rate is money raised by taxation, *ergo*, the poor rate is a tax. I am therefore of opinion, that the exempting clause in this act of parliament includes the poor rates, and that the plaintiff, upon this record, is entitled to judgment."[d] And, *à fortiori*, the parson was held not rateable, where in the act it had been declared that the commutation rent was to be paid free from all rates, taxes, and deductions whatsoever.

[a] *R.* v. *Lambeth*, 1 Str. 524. [b] *R.* v. *Boldero*, 4 Barn. & Cres. 467.
[c] *Mitchell* v. *Fordham*, 6 Barn. & Cres. 274; *R.* v. *Boldero*, ante.
[d] Per Abbott, C. J., in *Mitchell* v. *Fordham*.

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But where under a similar arrangement it was declared only that the parson should receive the net value of the tithes, it was held that this meant their value deducting only the expense of collecting, and not deducting also local burthens.[e]

It has been decided that a vicar was not liable to be rated for a rent-charge payable in lieu of tithes, which were not extinguished by the act, but transferred to a third party. It was provided by an act of parliament that all lands, tithes, and hereditaments in a parish, should be enjoyed by a party in severalty, with all the tithes arising from them or any other lands, subject to the payment of the yearly sum of 100*l.* to the vicar of the parish for the time being, payable quarterly, with a power of distress; and it was held that the vicar was not liable to be rated because the tithes were not extinguished, but transferred to the owner of the land; and that if he was rated, there would be a double rating, that is, a rating of the transferee for the tithe, and of the vicar for the money payment.[f] Formerly it may have been a doubtful question, if the parson let his tithes by deed, which of the two, the lessee or the parson, was rateable for them. But all questions of this nature will now be confined to those cases only where there has been a private act of parliament, or where compositions, confirmed by a decree of a court of equity, have not since been set aside, and are consequently valid by virtue of the 2 & 3 Will. IV. c. 100. For in all the ordinary cases of tithe commuted under the recent act, the party on whom the rate is to be assessed, and the mode of recovering payment, are clearly designated and expressed.[g]

Tithes and tithe rent-charge are also liable to the high- Highway rate.
way rate. The statute,[h] directing this, made no distinction between tithes of the incumbent and tithes appropriate, but directs the assessment to be made upon every occupier of lands, tenements, woods, tithes, &c. within the parish; and by the 27th section of stat. 5 & 6 Will. IV. c. 50, which repeals the above act, the highway rates are directed to be levied upon all property then liable to be assessed to the relief of the poor: provided that the same rate should also extend to such woods, mines and quarries of stones, or other hereditaments, as had theretofore been usually rated to the highways.

The cases above considered as to the exemption from the poor rate of compositions under an inclosure act, or

[e] See *R.* v. *Lacy*.
[f] *R.* v. *Great Hambledon*, 1 Ad. & Ell. 145.
[g] See post.
[h] 13 Geo. 3, c. 78, s. 45.

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by arrangement between the parties, are equally applicable to the case of highway rates. Thus a rector was held to be rateable to the repair of the highways in respect of rents which were substituted for tithes under an inclosure act, which directed that all great tithes payable to the rector of the parish should be extinguished, and that the commissioners should ascertain the net value of such tithes, and affix a fair clear annual rent or sum of money per acre in lieu of such tithes, and as an adequate compensation for the same to the rector.[h]

Who is the occupier of tithes within the Highway Act.

In strictness of language there cannot be an occupier of tithe; tithe in its nature not being the subject matter of occupation. But by the occupier of tithes within the General Highway Act, 13 Geo. III. c. 78, is understood the person who receives the tenth part of the produce. When the owner of the tithe grants out and conveys any of the tithe to another, that other is the occupier. Where the right continues in himself, he is the occupier.[i] As for example: A. being lessee of tithes, compounded for them with the respective occupiers by parol agreements, under which they retained the tithes accruing on their respective lands to their own use, with the remaining nine parts, from which no severance took place; the tithes were not bargained and sold when at maturity, but the agreements were prospective, and had no reference either to any specific mode of cultivating the lands, or to the amount of the produce in any particular year. The composition money was paid half-yearly, and it was held that the lessee was an occupier of tithes within the meaning of the words in the Highway Act, and liable to be rated as such.[k]

Tithes not liable to church rates.

It may be here observed, that all property forming part of a rectory or vicarage is exempt from church rates, whoever may be the occupier; and that no parson or vicar can be charged to the repairs of the church of any parish by reason of their tithes or glebe therein: and the reason of this is, because out of them they are bound to repair the chancel, of which liability we have spoken in another place.[l]

Proportions in which tithe rent-charge is to be rated.

We next proceed to inquire the rule by which tithe rent-charge is to be rated, and the proportion relatively to other kinds of property in which the rate is to be imposed.

No poor rate is to be allowed by any justices, or to be of any force which is not made upon an estimate of the

[h] *Rex* v. *Lacy*, ante.
[i] Shelford on Tithes, 40.
[k] *Chanter* v. *Glubb*, 9 Barn. & Cres. 479.
[l] 17 Viner's Abr. 577, 578; and see Prideaux on Churchwardens, 88, &c.

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net annual value of the hereditaments rated,—that is, of the rent at which the same might reasonably be expected to be let from year to year, free of all usual tenants' rates and taxes and tithe commutation rent-charge (if any), deducting the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain them in a state to command such rent.[m] This enactment is an affirmance of the old established rule of rating, that all lands are to be assessed in proportion to the net rent which a tenant at rack-rent would pay, he discharging all rates, charges and outgoings. Thus, prior to the statute above-mentioned, the question for the Court of Q. B. in a case on appeal from the sessions was, in effect, whether the occupier of lands in a district of the parish of Pagham, which was liable to be flooded, and was protected from floods at a certain occasional expense, ought to be rated at the same sum as the occupier of lands of similar quality and of equal annual produce, lying in the same parish, but not liable to the same expense; and the court was of opinion that he ought not: and in that case Parke, B. adds: "It is not material whether the whole or a certain aliquot part of the net profit be rated, provided all lands of the same description are rated equally upon that aliquot proportion of the profit; and in practice it is usual, and it is most convenient, to rate lands at the rack-rent which they would pay to a landlord, or some certain portion of it, the tenant paying all rates, charges and outgoings,—which is, in effect, rating according to a part of the net profit only; but provided it be the same aliquot part in all cases, it makes no difference."[n]

All rates to be on the net annual value.

What is taken to be net annual value.

Further, if the subject of occupation be of a perishable nature, or require any annual expense to secure its existence, an allowance ought to be made on this account; for the total annual profit is not the net annual profit,—a part must be set aside for the restoration and maintenance of the subject of occupation. It is on this principle that buildings have been permitted to be rated at less in proportion than arable and other land. The cases, especially those of a more recent date, in which the principle of rating has been more fully discussed and considered, will be found to have established this rule of rating, which is, in other words, that all lands are to be assessed in proportion to the net rent which a tenant at rack-rent would pay, he discharging all rates, charges and outgoings.[o]

The common law and the statute having alike established

Equality in rating necessary.

[m] 6 & 7 Will. 4, c. 96, s. 1.

[n] *Rex* v. *Adames*, 4 Barn. & Ad. 61; 1 Nev. & Man. 662. [o] Ibid.

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the above to be the correct rule of rating, as to the deductions proper to be made, another principle is to be applied, for the great object to be aimed at in every rate is equality; so that, whatever be the proportion in which, according to its true rateable value ascertained by the above rule, any kind of property is rated, the same is the proportion in which every other kind of property in the same parish is to be rated. These principles, if correctly applied, appear not only to be consistent with but necessarily connected with one another.

Application of these rules to the rating of tithe rent-charge.

It was however at one time imagined that, as between the rate imposed upon lands and that imposed on tithe and tithe rent-charge, there would be no equality unless the net annual value of the lands to be rated was taken to be, in addition to the rent at which the same might reasonably be expected to be let, such further annual value or profit as the farmer might obtain in consequence of his labour and capital expended on them, or, which would have been the same thing, unless the tithe or tithe rent-charge was rated proportionably less. And in fact it at one time appeared to be established by the following case that such was the correct mode of computation in order that equality might be attained; for in the case of the *King* v. *Joddrell*,[p] it was said by Parke, J.: "The second objection was, that the *farmer's share of profit* ought to have been rated, or, which is the same thing, that the appellant (the tithe owner) should have been rated proportionably less; and that objection should, in our opinion, have prevailed. Of the whole of the annual profits or value of land, a part belongs to the landlord in the shape of rent, and part to the tenant; and whenever a rate is according to the rack-rent, it is in effect a rate on a part of the profit only. It must therefore, in the next place, be ascertained what proportion the rent bears to the total annual profit or value, and that will show in what proportion all other property ought to be rated. If, for instance, the rent is one-half or two-thirds of the total annual profit or value of land, the rate on all other property should be on a half or two-thirds of its annual value. In this case it is clear that there was a share of profit received by the tenant upon which there has been no rate; and in that respect the farmers were assessed in a less proportion of the true annual profit or value than the appellant. The sessions were therefore wrong in disallowing this objection, and they ought to ascertain the ratio which the rent of land bears to its average annual profit or value, and assess

Supposed different principle on which tithe and lands were to be rated.

[p] 1 Barn. & Ad. 403.

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the appellant for his tithe rent in the same ratio." And this doctrine apparently was adopted, and the above case referred to as an authority on this point in a case decided shortly afterwards.

The following passage in Nolan's Poor Laws is also in favour of the doctrine. After mentioning the different modes of valuation it is there said, "all these modes of valuation proceed upon the assumption, that the rack-rent is the criterion of that actual value upon which the tax is laid: but this principle is fallacious; rent being only so much of the actual value as the tenant can afford to pay his landlord, deducting the expense of cultivation, and a reasonable remuneration for trouble and time. The rent therefore is the landlord's profit; the reasonable remuneration is the tenant's profit. Both come from the land, and form parts of its productive value. When land is occupied by the proprietor, he receives both these profits; when it is demised to a tenant, they are divided." But it was well observed by Mr. Justice Parke, in the conclusion of his judgment in the case of *The King* v. *Joddrell*, that "although the rate must be amended in conformity with the principles there laid down, a precise and accurate application of those principles would be impracticable." And he might have added, that the amount of the tenant's profit in proportion to rack-rent would in fact differ in every conceivable ratio in different parishes, or even in different parts of the same parish, according to the quality of the land; nor does there appear to be any criterion by which an approach to certainty could be attained.

Difficulty of applying such a principle.

But in truth an error is introduced, as we shall presently see was observed by Lord Denman, in the use of the words "profits" and "value" as synonymous, for the annual value of the land is correctly represented by the rack-rent which the landlord obtains for it; while the profit obtained by the farmer is not so much arising from the land, as from the capital and industry he employs upon it; and as larger capital and greater industry are employed, so probably will that profit be increased. That profit in fact is only to be obtained by applying the skill and industry of man to capital *brought from another source, and quite independent of the land itself.* The annual profit of the farmer is therefore independent of the land, it is the profit not of the land, but of his capital or stock. And as to this it is expressly said in Viner's Abridgment,[p] a farmer is not to be taxed to the poor for his necessary stock according to the land he holds; but if he has a superabundant stock,

Error and incorrectness of the principle.

[p] 16 Vin. Abr. 426, Poor, E. pl. 6.

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i. e. more than the land requires, he shall be taxed for that." In the margin it is added, "it may be laid either on lands or goods; but a farmer being assessed for the land he occupies, shall not be assessed for his stock on it necessary for manure, nor the profits for which he has been already taxed, but for other stock he is taxable:" and again it was resolved, by three judges against Holt, C. J., that a farmer shall not be rated to the poor for his necessary stock which he uses on his farm, for that would be in effect to make the land pay twice for one thing, viz. for the rent, and also for the stock. But a farmer shall be taxed for his riches and stock, in case the stock is more than is necessary for the carrying on his farming, and paying his rent, for then it is like a stock in trade.[q]

But even if the rate had been assessed upon this stock or capital, the inequality, so far from being removed, would only have been increased and made more extensive, unless inquiry had been made in every case into the profits of the capital and labour of every individual occupier of houses or lands in the parish, and several assessments made accordingly.

The principle now overruled.

In fact the rule which appeared to be introduced and sanctioned by the words of Mr. Justice Parke in the case of *The King* v. *Joddrell*, was equally inconsistent with principle and authority; and accordingly, in the following case brought before the Court of Queen's Bench, such a rule has been distinctly repudiated, and the judgment upon this point been overruled. In the case of *The Queen* v. *Capel*,[r] which was an appeal by an incumbent from an order of sessions, the appellant objected to the assessment as unequal and illegal, alleging that he was rated in a larger proportion to the full yearly amount of the clear profits of his tithes, and to the full yearly value of his dwelling-house, than the occupiers of lands in the parish, who were not rated enough in respect of their rateable ability as such occupiers, inasmuch as they were only rated to the amount of their rents, which was a smaller

[q] If any doubt could have existed as to whether a farmer would be liable to be rated in respect of his stock in trade, it is presumed that it would be now removed by the stat. 3 & 4 Vict. c. 89, whereby it is declared, that from and after the passing of that act, it shall not be lawful for the overseers of any parish, township or village, to tax any inhabitant thereof, as such inhabitant, in respect of his ability derived from the profits of his stock in trade, or any other property, for or towards the relief of the poor. The duration of this act was limited to one year, after which it was declared that its provisions should have no effect; but its duration has been by two subsequent statutes extended to October, 1844, and will probably continue to be extended, until its provisions shall be incorporated into some general act on the subject of rating.

[r] 12 Ad. & Ell. 382.

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proportion of the profits derived from the land, than the sum at which the vicar was rated bore to the yearly value of his tithes; and that the said occupiers were not rated for any part of the remainder of their profits, which amounted on an average of the parish to two-thirds of their rents: and that the occupiers of shops, warehouses, wharfs and factories in the parish were not rated high enough in respect of their rateable ability as such occupiers, inasmuch as the profits made from business carried on in the same, which amounted to a sum equal to their rents, were not included in the estimate of the annual value thereof to such occupiers. And he contended, that *such a reduction in the assessment on his tithes* and dwelling-house *ought to made, as would bear a just proportion to the assessment made on the occupiers of lands,* shops, warehouses, wharfs and factories, or that an increase on the assessments on the said occupiers in respect of their ability as such occupiers ought to be made, in proportion to their profits respectively.

In this case the statute above-mentioned, 6 & 7 Will. IV. c. 96, commonly called the Parochial Assessment Act, and which we have already mentioned as giving the correct rule of rating, was relied upon by both parties; the respondents contending for the plain and obvious meaning of the enactment in the first section; the appellant contending that the proviso immediately following the enactment, at the conclusion of that section, was intended to apply to the case of tithes, and that it showed the existence of the different liabilities in the case of tithes and lands, which it was sought to establish. The words of that proviso are as follows: "provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (if any), according to which the different kinds of hereditaments are now by law rateable."

Lord Denman in giving judgment says, this rate strictly complies with the enacting part of 6 & 7 Will. IV. c. 96, s. 1; and if that embraces tithes as well as land, and if the proviso at the end does not interfere, that rate will be good, even though it could not be sustained on the principles laid down in former decisions. But, supposing tithes to be within the enacting part, it was strongly contended that they must also be within the proviso. The language of this proviso, it must be owned, is very inartificial; and loose, to a degree which renders the discovery of a definite meaning to all its parts extremely difficult. To speak of the principles on which rating has proceeded is

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intelligible; but we also have to deal with the different "relative liabilities," according to which different kinds of hereditaments are "rateable." If principles "and liabilities" are intended to express the same thing, tithes are not within the proviso; for *the titheholder was never rateable on any principle different from the landholder*. But the word "liabilities" is supposed to go much further; and to set up the doctrine of *Rex* v. *Joddrell* to the extent of showing that land and tithes are under "different relative liabilities," which difference the proviso meant to leave untouched. On this much canvassed decision we cannot refrain from making some few remarks. 1. It neither introduced, nor affected to introduce, any new law. On the contrary, the court cited it in a later case, as a recognition of the old principle to which we have alluded. 2. The tithe owner had not been allowed any deduction beyond the parochial rates, which he paid on the gross amount of the corn-rent substituted for his tithes. Either, therefore, he was not rated on the principle of what his own corn-rent was worth to let after the usual tenant's deductions, or it was assumed, contrary to the fact, that the corn-rent would let for exactly its gross amount, deducting only the parochial rates. On the other hand, the respondents, the land occupiers, were rated on their actual rents, although it was admitted that a profit accrued to them from the occupation, beyond the rent, the interest of capital employed, the expenses of cultivation, and compensation for trouble, labour and superintendence: they therefore were rated on their rack-rent: but it was a rent manifestly below that which the land was annually worth. The sessions, therefore, in effect, found that the tithe composition was rated at its yearly value, and the land below its yearly value. The language of the court in that case must be admitted to go further. It appears to lay down the following rule, of general application and of great importance. "Of the whole of the annual profits or value of land, a part belongs to the landlord in the shape of rent, and part to the tenant; and whenever a rate is according to the rack-rent (the usual and most convenient mode), it is, in effect, a rate on a part of the profit only." Now, this important sentence expresses no general proposition of law, nor any conclusion of fact from any premises stated in the case: it is an assumption, in the most general terms, upon a point much questioned by those who have made such matters their peculiar study. It is certainly inconvenient to make such an assumption; the very terms "profit" and "value," used as synonymous, raise arguments as to their

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meaning; and the whole proposition is controverted. In this part of the argument, one consideration is supposed to be of the utmost weight. If the landlord held the farm in his own hands, the annual value would consist of the amount of rent for which it might be let, with the addition of the tenant's profit. He would, in that case, have nothing to deduct but the ordinary outgoings and his bailiff's wages. But who shall say that these wages might not be equal to the estimated profits of the tenant? or in the simpler case of the owner being entirely his own manager, that his personal labour, withdrawn from other profitable occupation, was not of equal value? As a proposition of law, we cannot assert this, nor as a fact deducible from scientific axioms too clear for controversy. That discussion we purposely decline, preferring to say merely that *Rex* v. *Joddrell* does not convince us that there was any difference in the legal liabilities of the tithe owner and the occupier of land. If any case shall arise in which the facts show that the rule, though formally applied according to the statute, will work injustice to the tithe owner, there will be no more difficulty in relieving him than in relieving one land owner as against another. But the facts of this case call for no such interposition.

No difference in the legal liabilities of tithe owner and land owner.

It is now therefore clearly settled, that there is no difference between tithe, or tithe rent-charge, and any other hereditaments in their relative liabilities to be rated; but that tithe and tithe rent-charge are to be rated upon an estimate of their net annual value.

The mode in which the net annual value is to be ascertained in the case of tithes, and what deductions are allowed to be made before the rateable amount is fixed, will be seen from the following parts of the judgment in the case of *The King* v. *Joddrell* above mentioned, and which remain unaffected by any subsequent decision. For it will have been observed, that the case last mentioned of *The Queen* v. *Capel*, while it over-rules the supposed principle which was sanctioned by the case of *The King* v. *Joddrell*, recognizes and establishes the authority of the last-mentioned case in all other respects. It was there said by Mr. Justice Parke, "This was a question between the rector of a parish and the farmers in it, as to the extent to which he on the one hand, and they on the other, ought to be rated. The tithes in the parish were extinguished, and the rector had a corn-rent or compensation in their stead. He was rated to the full extent of all he received, with the deduction only of what he paid for parochial dues. He claimed, as additional deduction,

Net annual value of tithe rent-charge, how ascertained.

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the amount of his land-tax, the amount of what he paid for ecclesiastical dues (which would include tenths, synodals, &c.), and a compensation for performing or providing for the duties of his incumbency. The farmers were rated at the *bonâ fide* amount of the rack-rent at which the farms were letting, or which they were worth to let, the tenants paying the corn-rent or compensation for tithe; and the rector contended that they ought to be rated in addition upon that corn-rent or compensation they paid him, and upon their share of profit beyond the rent. The great point to be aimed at in every rate is equality; and whatever is the proportion at which, according to its true rateable value, any property is rated, is the proportion in which every other property ought to be rated. The first thing upon every rate, therefore, is to ascertain the true rateable value of every property upon which the rate is to be imposed; and the next to see upon what proportion of that value a rate is in fact to be imposed. In the case of land, the rateable value is the amount of the annual average profit or value of the land after every outgoing is paid, and every proper allowance made, not, however, including the interest of capital, as the sessions have done, for that is a part of the profit. Tithe is an outgoing, and therefore the corn-rent or compensation for tithe in this case is not to be added to the amount upon which the farmer is rateable; and in respect of that portion of the annual profit or value which consists of tithe or corn-rent, the rector is himself to be assessed. The last objection was, that the appellant ought to have had the land-tax, ecclesiastical dues, and the expenses of providing for the duties of incumbency deducted from the rateable value of the tithes. As to the land-tax, that is always in practice paid in the first instance by tenants; and whether it is to be deducted or not in this case must depend upon the answer to a previous question, whether the tenants in the parish deduct it from the rents specified or not. If they do, the landlord pays it, in effect, out of the rent he receives; and the appellant, to be on the same footing, must do the same; in that case it must not be deducted in making the rate on him. But if the tenants pay the specified rents and the land-tax besides, then they have, in effect, not been rated upon that portion of the annual profit or value with which the land-tax is paid, but upon a part of the residue only, after deducting the land-tax. Upon this supposition the appellant must also be rated in a proportionate part of his profit, after deducting the land-tax. The ecclesiastical dues ought to be

True rateable value of property.

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allowed, because they are payable by the appellant in respect of his rectory, and the profits of the rectory constitute the only fund out of which they can be paid; but the expenses of providing for the duties of incumbency ought not to be deducted, because those duties are personal, and ought to be performed personally by the incumbent. The last objection, therefore, ought to prevail in part.

Expenses of providing for duties of incumbency not to be deducted.

Having ascertained to what rates tithe and tithe rent-charge are liable, and in what proportions, on what amount, and subject to what deductions, they are to be assessed, we next inquire in what manner such rates may be recovered and enforced. This is now regulated by the Act for the Commutation of Tithes, by which it is declared,[s] that all rates and charges to which any tithe rent-charge is liable shall be assessed upon the occupiers of the lands out of which such rent-charge shall issue; and in case the same shall not be sooner paid by the tithe owner, they may be recovered from such occupier in like manner as any poor rate assessed on him in respect of such lands. And any occupier holding such lands under any landlord, and who shall have paid any such rate or charge in respect of any such rent-charge, shall be entitled to deduct the amount thereof from the rent next payable by him to his landlord; and any landlord or owner in possession who shall have paid any such rate or charge, or from whose rent the amount of any such rate or charge shall have been so deducted, shall be entitled to deduct the amount thereof from the rent-charge, or by other lawful ways and means to recover the same from the tithe owner, his executors or administrators: provided, that the tithe owner shall have and be entitled to the like right of demanding, inspecting and taking copies of every assessment containing such rate or charge, and of appeal against the same, and the like power of prosecuting such appeal, and the like remedies in respect thereof, as any occupier or rate payer has or may have in the case of poor rates, although such charge or rate is by the act made assessable upon the occupier, and the owner of the rent-charge is not mentioned by name in such assessment.

Mode of recovery, &c. of rates charged on tithe rent-charge.

Right of tithe owner to inspect the rate.

The churchwardens and overseers of the poor are to allow any inhabitant to inspect the poor rates, and to take copies; and a penalty of 20*l.* is imposed for refusing such inspection and copies.[t] But the demand of an inspection must be made at a reasonable time and place; and therefore, where the demand was made at a parishioner's own

[s] 6 & 7 Will. 4, c. 71, s. 70.

[t] 17 Geo. 2, c. 3, ss. 2, 3.

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house at 8 o'clock in the evening, and not at the house of the overseer, no penalty was incurred by the refusal.[u]

The provisions of the 17 Geo. II. c. 3, appear to be superseded by those of the 6 & 7 Will. IV. c. 96, which provides, that any person rated to the relief of the poor of the parish, in respect of which any rate shall be made, may at all seasonable times take copies thereof, or extracts therefrom, without paying any thing for the same; and in case the person or persons having the custody of such rate shall not permit such person or persons so rated as aforesaid to take such copies or extracts, the person or persons not permitting such copy or extract to be made shall forfeit and pay any sum not exceeding 5*l.*, to be recovered in a summary way before any justice of the peace having jurisdiction in the parish or place.

It would, however, lead us too widely from our present subject, if we were here to enter upon and explain those remedies of the rate payer, which are above alluded to; for these the reader is referred to those works which have treated more particularly of the law of rating.[x]

It was said by Mr. Justice Taunton, in *The King* v. *The Justices of Sussex*,[y] that where compositions for tithes were entered into by the rector, the parish had a right to put his name upon the rate for the entire sum, that they might have his responsibility for the whole. If that be so, it does not appear to be altered or affected by the words of the act last mentioned.

Assessment may be made on occupier of land or on tithe owner.

By the statute 7 Will. IV. & 1 Vict. c. 69,[z] it is enacted, that all rates and charges, to which any tithe rent-charge shall be liable, may be assessed upon the owner of the rent-charge; but it does not state positively that it *shall* be assessed upon him; and it is presumed, therefore, that whether assessed upon the tithe owner, or upon the owner of lands out of which the rent-charge shall issue, according to the provisions of the first mentioned act,[a] it would in either case be equally correct, and that no objection could be raised to such a rate. But in order to provide more particularly for the distinguishing the several interests in respect of which the rate is imposed, and to prevent any confusion as to liability in respect of the rent-charge, and the land upon which it is charged, it is enacted by the 2 & 3 Vict. c. 62, that the assessor or collector of any rate on tax shall, within forty days after a notice in writing

[u] *Spenceley* v. *Robinson*, 3 Barn. & Cress. 658.

[x] See Dickenson's Quarter Sessions; Theobald on the Poor Laws; Archbold, tit. Poor; 17 Geo. 2, c. 3; 6 & 7 Will. 4, c. 96.

[y] 3 Nev. & Man. 265. [z] Sect. 8. [a] 6 & 7 Will. 4, c. 71, s. 70.

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signed by any land owner or tithe owner interested therein, specify in his assessment made for the purpose of levying and collecting such rate or tax, the names of the several occupiers of tithes, lands and tenements subject to such rate or tax, as well as the sum assessed on the tithes, lands or tenements held by each occupier.[b] The whole or any part of the rate thus assessed upon the tithe owners may be recovered from any one or more of the occupiers of the lands out of which such rent-charge shall issue, in case the same shall not be sooner paid by the owner of the rent-charge upon which it is assessed, in the same manner as any poor rate assessed upon such occupier in respect of the lands in his occupation may be recovered. Twenty-one days' notice in writing, previous to any one of the half-yearly days of payment of the rent-charge, must be given to the occupier. And the collector's receipt for the payment of such rates and charges shall be received in satisfaction of so much of the rent-charge by the owner thereof. But no occupier shall be liable to pay, at any one time, in respect of such rates and charges, any greater sum than the rent-charge payable in respect of the lands occupied by him in the same parish shall amount to for the current half year in which such notice shall have been given.[c]

Mode of recovery when assessed upon tithe owner.

Section 10.

Recovery of Tithe Rent-charge.

Tithe rent-charge is now made recoverable by distress and entry, that is, the remedy is directly upon the land charged; but no party is personally liable to pay it,[d] so that the remedy cannot be by action.

If, therefore, the rent-charge remain unpaid for twenty-one days, power is given to distrain after ten days' notice in the same manner as for rent reserved on a common lease for years; but not more than two years' arrears can be recovered. If the rent-charge be in arrear for forty days, and there shall be no sufficient distress on the premises, any judge of the courts of record at Westminster may, upon affidavit of the facts, order a writ to be issued, directed to the sheriff of the county in which the lands are situate, requiring him to summon a jury to assess the arrears of rent-charge remaining unpaid, and to return the inquisition thereupon taken. A copy of this writ, and a

By distress and entry.

Mode of proceeding.

[b] 2 & 3 Vict. c. 62, s. 3.
[c] 7 Will. 4 & 1 Vict. c. 69, s. 8.
[d] 6 & 7 Will. 4, c. 71, s. 67.

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notice of the time and place of its execution, is to be given to the owner of the land, or left at his last known place of residence, or with his agent, ten days previous to its execution. This writ the sheriff is required to execute; and the costs of the inquisition are to be taken by the proper officer. The owner of the rent-charge may then sue out a writ of *habere facias possessionem*, directed to the sheriff, commanding him to cause the owner of the rent-charge to have possession of the lands chargeable therewith until the arrears of rent-charge found to be due, and the said costs, and also the costs of such writ and executing the same, and of cultivating and keeping possession of the lands, shall be fully satisfied: provided, that not more than two years' arrears over and above the time of such possession shall be at any time recoverable.[e]

The party taking possession may be called to account for the profits of the land, and of the receipts and payments in respect thereof, by the order of any such judge as before mentioned; and when he has accounted, a writ of supersedeas to the before-mentioned order may be issued, and by rule or order of court such judge may from time to time give such summary relief to the parties as he may think fit.[f]

In case of Quakers.

Distresses to be made under these provisions upon the lands of Quakers may be made upon their goods, &c., whether on the premises or elsewhere. And in all cases of such distresses, the goods, &c. may be sold without its being necessary to impound or keep them. But no writ shall be issued for assessing or recovering any rent-charge payable in respect of any lands in the possession of such persons, unless it shall have been in arrear for forty days next after any half-yearly day of payment, without the owner of the rent-charge being able to find any goods, &c., either on the premises or elsewhere, liable to be distrained, sufficient to satisfy the arrears to which the lands are liable, together with the costs of the distress.[g]

It has been observed that, in consequence of the word elsewhere being inserted in the second place, the owners of the rent-charge may have some difficulty in ascertaining the fact whether a Quaker, who resides at a distance, has goods liable to be distrained. Before the writ is issued, an affidavit of the facts will be required; one of which will be, that the person entitled to the rent-charge cannot find any goods to distrain.[h]

To what lands the power of distress, &c. extends.

Notwithstanding the apportionment of the rent-charge,

[e] Sect. 82.
[f] Sect. 83.
[g] Sect. 84.
[h] Shelford on Tithes, 271.

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the powers of distress and entry for recovery of it are to extend to all lands within the parish, which may be occupied by the owner under the same landlord, whether the arrears may have been chargeable on the lands on which such distress is taken, or upon any other so occupied.[l]

Summary jurisdiction for recovery.

If the rent-charge to be recovered does not exceed ten pounds, or if, in the case of Quakers, it does not exceed fifty pounds, and also if there is no claim of prescriptive exemption or modus in the case, the party to whom it is payable is to make complaint to one or more justices of the peace, who may summon the party against whom the complaint is made to appear before him or them, and adjudge the case in writing under their hands and seals, and also such costs, not exceeding ten shillings, as shall appear just; or they may give costs, not exceeding the same amount, to the party prosecuted, if they find the complaint false and vexatious. From the decision of the justices an appeal is given to the sessions; and if the sessions confirm the order of the justices, they may give such costs against the appellant as may seem just and reasonable.[k] Where the justices are patrons of the church, the parties are to be summoned before the justices of an adjoining county, riding or division.[l]

Appeal.

No proceeding may be had in any other court to recover tithes or tithe rent-charge under the value of ten pounds, according to these provisions, except in the cases before mentioned, where the liability of the party is disputed;[m] and the effect of this provision has been held to be to oust the jurisdiction of the Ecclesiastical Court altogether in such cases; so that a prohibition might be granted, if that court should attempt to enforce an undisputed payment under the above sum.[n] The other provisions of the act last referred to contain some further directions as to the recovery of tithe; which, however, have been embodied in the other provisions mentioned in this section, and the act containing which was passed subsequently.

[l] Sect. 85.
[k] 7 & 8 Will. 3, c. 6; 3 & 4 Anne, c. 18; 53 Geo. 3, c. 127; *R.* v. *Jefferies*, 1 B. & C. 604.
[l] 7 Geo. 4, c. 15. [m] 5 & 6 Will. 4, c. 74.
[n] *Richards* v. *Dyke*, 2 Gale & Dav. 493.

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CHAPTER III.

OF OFFERINGS AND OBVENTIONS.

Definition of.

OFFERINGS, &c. are defined by the canonists to be, "Whatsoever things are offered by pious and faithful Christians to God and holy Church, whether of things real or personal, and whether they are bequeathed by will or given in any other manner."[a] And if such a definition be correct, it would appear that such offerings cannot be due of common right; but that having been originally given by the pious and faithful, the custom of giving them generally began to be observed in certain places; the observance of which custom would now, wherever it has been thus established, be compelled. It may be true that it appears from the canons, that while some offerings were free and voluntary, others were certain and obligatory; but as the canons could not bind the laity to a payment to which they were not otherwise compelled, these certain and obligatory payments must be taken to be such as are due by custom.

Are not due of common right.

It has been doubted whether Easter offerings are not a composition for personal tithes;[b] but the matter is altogether speculative, nor can anything be asserted on the subject with reasonable certainty. It is certain, however, that personal tithes were never due of common right, but only by special custom; so that if Easter offerings were a compensation for them, all claims of such offerings as due of common right must be abandoned. There are, however, some authorities in support of the common law right to Easter offerings, and which would seem to warrant the proposition that they are due at the rate of two-pence for every person of sixteen years of age and upwards.[c] On the other hand, it has been expressly laid down that Easter offerings are due by custom only.[d] But these authorities may probably be satisfactorily reconciled by supposing that in every authority, which would appear to be in favour of the common law right, and of a particular sum, the court was alluding

But by custom only.

[a] 2 Inst. 439; Wats. c. 52: Degge, p. ii. c. 23.
[b] See 1 E. & Y. 818; 2 Wood, 280.
[c] *Lawrence* v. *Jones*, Bunb. 173.
[d] *R.* v. *Reeves*, 2 E. & Y. 55.

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to the case actually before them, in which a custom had in fact been proved. For as to the sum of two-pence, above mentioned, it would be difficult to discover how or upon what authority that particular sum came to be fixed on. None of the earlier ecclesiastical writers make any allusion to the payment of any particular sum as generally payable even by custom. Watson, indeed, says that there are in many places, by custom, two-pence payable for every communicant; and in certain cases decided in 1740, 1741, the Court of Exchequer ordered payments of two-pence a-head for every person above the age of sixteen to be established as moduses or customary payments.[e] But a special custom may be proved for the payment of a greater or a less sum than two-pence a-head; or there may be a custom for the master of a family to pay a certain gross sum of money for Easter offerings for all the persons in his family.[f] And it may be observed, that such customs are inconsistent with the notion that two-pence a-head could be payable of common right.

At what time payable.

As to the time at which these offerings would be payable, it is declared by the statute 2 & 3 Edw. IV. c. 13, that all and every person or persons who by the laws or customs of this realm ought to make or pay their offerings, shall yearly well and truly content and pay the same to the parson, vicar, proprietor, or their deputies or farmers, of the parishes where they shall dwell or abide, and that such four offering days as at any time theretofore, within the space of four years last past, had been used or accustomed for the payment of the same; and in default thereof to pay for the said offerings at Easter then next following. But this statute, as has been observed by several writers, refers not to voluntary offerings, but only to such as were established to be due by custom. And Dr. Burn observes, that, concerning the offerings at Easter, it is directed by the rubric at the end of the communion service, that yearly at Easter every parishioner shall reckon with the parson, vicar or curate, or his or their deputy or deputies, and pay to them all ecclesiastial duties, accustomably due, then at that time to be paid.[g]

How recoverable.

If there is no question about the custom, and that is clearly admitted, Easter offerings may be sued for, and ought to be sued for, in the spiritual court; but the spiritual court, as has been before observed, can have no

[e] 2 Wood, 390, 398.
[f] *Wright* v. *Elderton*, 1 Wood, 518; 1 E. & Y. 694; *Kirkby* v. *Redhead*, 1 Wood, 19.
[g] Burn's E. L., Offerings.

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power to determine the existence or non-existence of a custom. If, therefore, the custom were disputed, the ecclesiastical judge would not be permitted to proceed in the suit; and if he did so, the party might have a prohibition, for the custom must be tried at common law. Whether Easter offerings could be recovered by a suit in a court of equity appears doubtful. The result of the authorities appears to be, that in a suit for tithes the bill might pray an account of Easter offerings also, but that neither could a bill be filed for an account of Easter offerings only, nor would any decree be made as to them if an account of them had been prayed in a suit for tithes, and the bill as to tithes had been dismissed.[h]

Summary jurisdiction in recovery of.

It would, however, appear very improbable that the amount of Easter offerings sought to be recovered should exceed the sum of 10*l.*, in which case the mode of recovery would be the same as that already spoken of for the recovery of tithes which do not exceed that value; and every other mode of recovery, except that of proceeding under the summary jurisdiction there mentioned, is altogether superseded.[i]

Mortuaries.

Mortuaries are another species of customary payments, as to which there never has been any doubt but that they are payable by special custom only; and they are said to have been given *pro recompensatione subtractionis decimarum personalium, necnon et oblationum.*[k] The payment of them appears to have been decreed by a provincial canon made in the year 1378, but there is no authority to show how far the canon was ever obeyed, for the laity could never have been bound by it. It is probable, however, that shortly previous to the Reformation some considerable disputes had taken place respecting the payment of these mortuaries, for in the 21st year of Henry VIII.[l] we find a statute passed for restraining the excessive exaction of them; by which act it was enacted, 1. That no mortuary should be paid where the goods of the deceased were under the value of ten marks. 2. That no mortuaries should be given or demanded, except in those places where they had been used to be paid or given. 3. That there should be but one mortuary paid for one person, and after the rate, that where the moveable goods were of the value of ten marks and under thirty pounds, after all debts paid, three shillings and four-pence. Where the value amounted to thirty pounds and under forty pounds, six shillings and

[h] See *Vernon* v. *Sloane*, Gw. 889; 2 E. & Y. 169; *Lawrence* v. *Yeates*, 2 Wood, 276; 1 E. & Y. 828; *Baker* v. *Athill*, 2 E. & Y. 415.

[i] See 6 & 7 Will. 4, c. 74. [k] 2 Inst. 491. [l] C. 6.

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eight-pence. If they were of the value of forty pounds and upwards, ten shillings. 4. That no mortuary should be paid for any married woman, child or person not keeping house, nor for any wayfaring man or person who did not reside where he died; but that the mortuaries of such non-resident persons should be paid at their usual place of abode. 5. That parsons, vicars, curates, parish priests and other spiritual persons may receive bequests or legacies notwithstanding the act. 6. No mortuaries to be paid in Wales, Calais or Berwick, except where they have been usually paid. 7. That the four Welsh bishops may take mortuaries notwithstanding the act. 8. That where less than the rates aforesaid have been paid, the same payments shall continue; but that no mortuary shall be taken in such places for persons exempted by the act.

Tithes in the city of London.

Tithes in the city of London are a customary payment, which seems to partake more of the nature of the payments spoken of in the present chapter than of tithes; but the special custom has been clearly established, and the payment is not voluntary. These tithes, or substitutions for tithes, are an assessment upon each house in proportion to the rent, and a variety of cases have been decided connected with this subject; but as it is one of local interest only, and unconnected with the general subject of tithes or offerings, it would be too great a deviation from the purpose of this work to enter more fully into the subject.[m]

Offerings, &c. may be commuted.

Easter offerings, mortuaries and surplice fees may now be commuted for a certain sum, by a parochial agreement at any time before the confirmation of the apportionment after a compulsory award for commutation of tithes; but the payments so fixed must be made payable on the same days as the tithe rent-charge, and they are made recoverable in the same manner. It is left to the judgment of the commissioners to decide what provisions and powers in the acts for the commutation of tithes, as to parochial agreements, shall be applicable to agreements of this kind.[n]

[m] For the law on this subject see 2 Eagle on Tithes, ch. 17.
[n] 2 & 3 Vict. c. 62, s. 9.

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CHAPTER IV.

OF FIRST FRUITS AND TENTHS, AND OF THEIR APPLICATION.

Primer seisin.

Reliefs, which were incident to all the feudal tenures, were a sum of money paid to the lord by the heir upon his first coming to the estate; and of a nature somewhat similar to this was *primer seisin*, another feudal burthen, which was only incident to the king's tenants in capite, and which was a right which the king had, when any of his tenants in capite died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession, and half a year's profits if the lands were in reversion expectant on an estate for life.[a]

This practice seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but as to the king's tenures in capite, the *prima seisina* was expressly declared, under Henry III. and Edward II., to belong to the king by prerogative, in contradistinction to other lords. The king was entitled to enter and receive the whole profits of the land till livery was sued; which suit being commonly made within a year and a day next after the death of the tenant, in pursuance of the strict feudal rule, therefore the king used to take as an average the first fruits, that is to say, one year's profits of the lands.[b]

The origin of first fruits.

In this feudal custom we have the origin of the payment of the first fruits of benefices: for the popes claimed to be the feudal lords of the church; and, in analogy to the custom just mentioned, they laid claim to profits of the first year upon the institution of every clergyman. The first introduction of this claim appears to have been by Pandulph, the pope's legate during the reigns of John and Henry III., but at that time in the see of Norwich only, and afterwards attempted to be made universal by Popes Clement V. and John XXII. But, as in most cases of this kind, the exact time of their introduction, as a tax generally acquiesced in, is not certain. And it is said, with probability, to have been a tribute gradually by little and little imposed, in the first place on such vacant benefices

[a] Co. Litt. 77; 2 Black. Com. 66. [b] Ibid.

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as the pope had himself bestowed; and certainly there is nothing to lead to the belief that, as a mere claim of a payment to the pope, first fruits were ever universally, or even generally, admitted in this country until the temporal power and interest came to unite with that of the spiritual, for the purpose of exacting them. This seems to have been in the year 1253, when Pope Innocent IV. gave the first fruits and tenths to King Henry III. for three years, which occasioned a taxation in the following year, sometimes called the Norwich Taxation, and sometimes Pope Innocent's Valor.[c]

And this seems to confirm the above supposition; for it is not probable that the pope would have given up such a revenue for three years, if he had been able to collect it generally for himself; but if the claim had not then been generally acquiesced in, it would have been a stroke of policy in order thereby to get a confirmation of a doubtful claim. In 1288, Pope Nicholas IV. granted the tenths to King Edward I. for six years, towards defraying the expenses of an expedition to the Holy Land; and that they might be collected to their full value, a taxation, by the king's precept, was begun in that year, and finished, as to the province of Canterbury, in 1291, and as to that of York, in the following year, the whole being under the direction of John, Bishop of Winchester, and Oliver, Bishop of Lincoln.[d]

But, nevertheless, it appears that in the same reign, at a parliament held at Carlisle, great complaint was made of intolerable oppressions of churches and monasteries by William Testa (called Mala Testa) and the legate of the pope, and principally concerning first fruits; at which parliament the king, by the assent of his barons, denied the payment of first fruits of spiritual promotions within England, which were founded by his progenitors, and the nobles and others of the realm, for the service of God, alms and hospitality. And to this effect he wrote to the pope; and thereupon the pope relinquished his demand of first fruit of abbeys; in which parliament the first fruits for two years were granted to the king.[e]

Tenths.

The tenths, or decimæ, were the tenth part of the annual profit of each living by the same valuation, which was also claimed by the holy see, under no better pretence than a strange misapplication of that precept of the Levitical law, which directs that the Levites should offer

[c] See Hume's Hist. of England; 1 Black. Com. 284; 2 Burn's E. L. 273, and compare authorities there mentioned.
[d] See Coleridge's note to 1 Black. Com. 284.
[e] 2 Burn's E. L. 274, and authorities there cited.

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the tenth part of their tithes, as a heave offering to the Lord, and give it to Aaron the high priest. But this claim of the pope met with a vigorous resistance from the English parliament, and a variety of acts were passed to prevent and restrain it, particularly the statute 6 Henry IV. c. 1, which calls it a horrible mischief, a damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept it on foot; sometimes more secretly, sometimes more openly and avowedly; so that in the reign of Henry VIII. it was computed, that in the compass of fifty years, 800,000 ducats had been sent to Rome for first fruits only. And as the clergy expressed this willingness to contribute so much of their income to the head of the Church, it was thought proper (when, in the same reign, the papal power was abolished, and the king was declared the head of the Church of England) to annex this revenue to the crown; which was done by statute 26 Henry VIII. c. 3, and a new *valor beneficiorum* was then made, by which the clergy are at present rated.[f]

First fruits and tenths annexed to the crown.

It does not appear that it would be useful now to enter into any detailed account of the different dealings with first fruits and tenths at the time of the Reformation; we follow, therefore, the concise account given by Blackstone.

For what and when payable.

By the last-mentioned statute, confirmed by that of 1 Eliz. c. 4, all vicarages under ten pounds a-year, and all rectories under ten marks, are discharged from the payment of first fruits; and if in such livings as continue chargeable with this payment, the incumbent lives but half a year, he shall pay only one quarter of his first fruits; if but one whole year, then half of them: if a year and a half, three quarters; and if two years, then the whole, and not otherwise. Likewise, by the statute 27 Henry VIII. c. 8, no tenths are to be paid for the first year, for then the first fruits are due. And, by other statutes of Queen Anne, in the fifth and sixth years of her reign, if a benefice be under 50*l.* per annum clear yearly value, it shall be discharged of the payment of first fruits and tenths. Thus the richer clergy, being, by the criminal bigotry of their popish predecessors, subjected at first to a foreign exaction, were afterwards, when that yoke was shaken off, liable to a like misapplication of their revenues, through the rapacious disposition of the then reigning monarch, till, at length, the piety of Queen Anne restored to the Church what had been thus indirectly taken from it. This she did, not by remitting the tenths and first fruits entirely, but in a spirit of the truest equity, by ap-

[f] 1 Black. Com. 285.

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plying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end, she granted her royal charter, which was confirmed by the statute 2 & 3 Anne, c. 11, whereby all the revenues of first fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings. This is usually called Queen Anne's Bounty.[g]

Compounding for.

First fruits are to be paid or compounded for at reasonable days, and upon good sureties, before the incumbent actually meddles with the profits of the benefice; and if he do meddle with the profits, without having done so, he is to be taken as an intruder on the king's possessions, and to forfeit double value.[h]

When due.

The time when the first fruits become payable is directly upon the avoidance, and profits go to the successor towards payment.[i]

In case of bishops.

Every archbishop and bishop has four years to compound for the payments of first fruits, to commence from the restitution of his temporalties; in every year to pay one-fourth; and if he die or be removed before the four years are expired, he shall be discharged of so much as did not become due at his death, in the same way that rectors and vicars are discharged.[j]

In case of other clergy.

As to deans, archdeacons, prebendaries, rectors and vicars, if they live to the end of the half-year next after avoidance, so that they may have received the rents and profits of that half-year, and before the end of the next half-year die, or be lawfully evicted, &c., they, their heirs, &c. shall only be charged with a fourth part of the first fruits. If they live one whole year after avoidance, and die or be evicted, &c. before the end of the half year then next following, they shall be charged with only half of the first fruits. If they live a year and a half and die, or be evicted, &c. before the end of the six months then next following, they shall be charged with three parts of the first fruits; and if they live to the end of two whole years, and not be lawfully evicted, removed or put out as aforesaid, they shall pay the whole.[k]

Tenths, when due, and remedies for recovering.

The tenths become due annually at Christmas, and if not paid before the last day of the following April, process may be issued against the defaulter, whereby the same may be levied against him or his executors, &c., and the defaulter is to forfeit double value;[l] or if nothing is to be found that can be levied, the process may be against the successor; for it seems that the debt is considered as due

[g] Ibid. [h] 26 Hen. 8, c. 3, ss. 2, 5. [i] 28 Hen. 3, c. 11, s. 3.
[j] 6 Anne, c. 17, s. 5. [k] 1 Eliz. c. 4, ss. 30, 31, 32, 33.
[l] 3 Geo. 1, c. 10, s. 3.

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from the benefice. But, in such case, the successor may distrain upon the goods of his predecessor, remaining on the premises, and retain the same till the predecessor, if he be alive, or, if he be dead, till his executors or administrators shall pay the same; and if the same shall not be paid in twelve days, then he may cause the goods to be appraised by two or three indifferent persons to be sworn for the same; and, according to the same appraising, may sell so much as shall pay the same, and also the reasonable costs of distraining and appraising; and if no such distress be found, then such predecessor, if he be alive, and, if he be dead, his executors and administrators, may be compelled to the payment thereof by bill in Chancery, or by action or plaint of debt at common law.[m]

Account of sums payable to be sent to clergy on their institution.

These first fruits and tenths were formerly paid to an office for collection of the same, but are now paid directly to the treasurer of Queen Anne's Bounty, who, immediately after the receipt of every return of institution made by the bishops of the respective dioceses in England or Wales, or other ordinaries, is to deliver or transmit by the post or otherwise, to every clerk or other person instituted to any ecclesiastical benefice, an account or statement in writing of the payments (if any) which are to be made by him in respect of the first fruits and yearly tenths of such benefice, and of the times and manner of making such payments.[n]

Notice of arrears to be sent to parties omitting to pay.

And whenever it appears to such treasurer that any person liable to the payment of first fruits or tenths shall have omitted or neglected to pay the same respectively for one calendar month over the proper time of payment, he shall thereupon give to each such person a notice in writing, or transmit the same by the post, addressed to him at the place of residence belonging to the benefice, or other ecclesiastical preferment, in respect of which such payment is required, stating the amount then appearing to be due from such person in respect of first fruits and tenths respectively; and such notice shall from time to time be repeated as often as the treasurer may deem expedient, and in particular between the 29th day of September and the 25th day of December in every year, such a notice shall be given, sent or transmitted as aforesaid, to every archbishop, bishop or other dignitary, rector, vicar or other person, from whom any first fruits or yearly tenths, or any sum or sums of money in respect thereof, may then appear to be due, in order that the payments of

[m] 26 Hen. 8, c. 3, s. 18; 27 Hen. 8, c. 8, s. 4; 3 Geo. 1, c. 10.
[n] 1 Vict. c. 20. s. 3.

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such first fruits and tenths may in no case be omitted or neglected through ignorance or inadvertence.[o]

But this notice, *ex gratiâ*, to the clergyman from whom such payment is due, does not alter or affect the remedies before mentioned, such as the enforcing payment by process or otherwise.[p]

Exceptions from liability to pay first fruits and tenths.

From the general payment of first fruits and tenths certain cases are excepted; for after Queen Anne had appropriated the revenue arising from the payment of first fruits and tenths to the augmentation of small livings, it was considered a proper extension of this principle to exempt the smaller livings from the burden of those demands; to which end, a certificate of such livings as did not exceed 50*l.* per annum at their improved value at that time, was made into the exchequer by the bishops, in order to the above exemption.[q]

But this exemption did not affect any existing rights; so that where the tenths of any such benefices had been granted away by any of the queen's predecessors, in perpetuity, those grants remained good.[r]

The dean and canon of St. George's, Windsor, and all their possessions, are also discharged from the payment of first fruits and tenths. Hospitals and their possessions, employed for the relief of poor people, or any school, or the revenues thereof, as existent in the first year of Queen Elizabeth, and grants theretofore made to the universities, or any college or hall therein, or to the college of Eton and Winchester, are also exempted.

Application of.

Having now seen in what manner first fruits and tenths are assessed and collected, and the payment of them enforced, it remains to be seen in what manner they are to be applied under the provisions of Queen Anne's Bounty. But first, it appears necessary to give a brief account of the corporation in whom these funds are vested, and by whose authority they are to be applied and distributed.

Governors of Queen Anne's Bounty.

The power to create this corporation was given to the queen by the statute 2 & 3 Anne, c. 2, and in pursuance of that statute, the following persons, namely, the archbishops, bishops, deans, speaker of the House of Commons, Master of the Rolls, privy councillors, lieutenants and *custodes rotulorum* of the counties, the judges, the queen's serjeants-at-law, attorney and solicitor-general, advocate-general, chancellors and vice-chancellors of the two universities, mayor and aldermen of London, and mayors of the respective cities, and, by supplemental

[o] Same statute, s. 9.
[p] Sect. 10.
[q] 5 Anne, c. 24; and see ante,
[r] Same stat. sect. 3.

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charter, the officers of the Board of Green Cloth, the queen's counsel, and the four clerks of the privy council, were made a corporation by the name of "The Governors of the Bounty of Queen Anne, for the Augmentation of the Maintenance of the poor Clergy," and to such corporation was granted the revenue of first fruits and tenths.

Duties of.

It was directed that this corporation should keep four general courts at least in every year, at some convenient place within London and Westminster (notice being in that behalf first given in the Gazette, or otherwise, fourteen days before), the said courts to be in the months of March, June, September and December; that the said governors, or so many of them as shall assemble, not less than seven in number at any one meeting, whereof a privy councillor, bishop, judge, or one of the queen's counsel to be one, shall be a general court, and dispatch business by majority of votes, with power to appoint committees for the easier dispatch of business.

They were also directed to inform themselves of the true yearly value of the maintenance of every such parson, vicar, curate and minister, officiating in any such church or chapel as aforesaid, for whom a maintenance of the yearly value of 80*l.* is not sufficiently provided, and the distances of such churches and chapels from London, and which of them are in towns corporate or market towns, and which not, and how they are supplied with preaching ministers, and where the incumbents have more than one living.

Officers of.

To have a secretary and treasurer, and such inferior officers, substitutes and servants, as they shall think fit, to be chosen by a majority of votes at a general court, and to continue during the pleasure of the governors; the secretary and treasurer to be first sworn at a general court for the due and faithful execution of their offices, and the treasurer to give security for his faithful accounting for the monies he shall receive by virtue of the said office.

Admitting other members of the corporation.

To have power to admit into their said corporation, all such persons who shall be piously disposed to contribute towards such augmentation, as the said governors, in a general court, shall think fit, and cause to be entered in a book kept for that purpose the names of all the contributors, with their several contributions, to the end a perpetual memorial may be had thereof, and whereby the treasurer may be charged with the more certainty in his account.

Also to draw up rules and orders for the better rule and

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government of the corporation, and distribution of their revenues, which rules and orders have been accordingly established as follows.

Rules of the corporation.

1st. That the augmentations to be made by the said corporation shall be by the way of purchase, and not by the way of pension.

2nd. That the stated sum to be allowed to each cure which shall be augmented be 200*l.*, to be invested in a purchase, at the expense of the corporation.

3rd. That as soon as all the cures not exceeding 10*l.* per annum, which are fitly qualified, shall have received 200*l.*, the governors shall then proceed to augment those cures that do not exceed 20*l.* per annum, and shall augment no other till those have all received 200*l.*; except in the cases and according to the limitations hereafter named. And that when all the cures not exceeding 10*l.* a year, which are fitly qualified, shall have received 200*l.*, the like rules, orders and directions shall be from thenceforth by the governors observed and kept, in relation to cures not exceeding 20*l.* a year, as are now in force, and ought to be by them observed and kept, in relation to cures not exceeding 10*l.* a year.

4th. That in order to encourage benefactions from others, the governors may give the sum of 200*l.* to cures not exceeding 45*l.* a year, where any persons will give the same or a greater sum, or the value thereof in lands, tithes, or rent-charges.

5th. That the governors shall every year, between Christmas and Easter, cause the account of what money they have to distribute that year to be audited; and when they know the sum, public notice shall be given in the Gazette, or such other way as shall be judged proper, that they have such a sum to be distributed in so many shares, and that they will be ready to apply those shares to such cures as want the same, and are, by the rules of the corporation, qualified to receive them, where any persons will add the like or a greater sum to it, or the value in land or tithes, for any such particular cure.

6th. That if several benefactors offer themselves, the governors shall first comply with those that offer most.

7th. Where the sums offered by other benefactors are equal, the governors shall always prefer the poor living.

8th. Where the cures to be augmented are of equal value, and the benefactions offered by others are equal, there they shall be preferred that first offer.

9th. Provided that the preference shall be so far given to cures not exceeding 20*l.* a year, that the governors shall

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not apply above one-third part of the money they have to distribute that year to cures exceeding that value.

10th. Where the governors have expected till Michaelmas what benefactors will offer themselves, then no more proposals shall be received for that year; but if any money remain after that to be disposed of, in the first place two or more of the cures, in the gift of the crown, not exceeding 10*l.* a year, shall be chosen by lot, to be augmented preferably to all others; the precise number of these to be settled by a general court, when an exact list of them shall be brought in to the governors.

11th. As for what shall remain of the money to be disposed of after that, a list shall be taken of all the cures in the Church of England not exceeding 10*l.* a year; and so many of them be chosen by lot, as there shall remain sums of 200*l.* for their augmentation.

12th. Provided, that when all the cures not exceeding 20*l.* a year, which are fitly qualified, shall be so augmented, the governors shall then proceed to augment those of greater value, according to such rules as shall at any time hereafter be proposed by them, and approved by the crown.

13th. That all charitable gifts in real or personal estates, made to the corporation, shall be strictly applied according to the particular direction of the donor or donors thereof, where the donor shall give particular direction for the disposition thereof; and where the gift shall be generally to the corporation, without any such particular direction, the same shall be applied as the rest of the fund or stock of the corporation is to be applied.

14th. That a book shall be kept, wherein shall be entered all the subscriptions, contributions, gifts, devises, or appointments, made or given, of any monies, or of any real or personal estate whatsoever, to the charity mentioned in the charter, and the names of the donors thereof, with the particulars of the matters so given; the same book to be kept by the secretary of the corporation.

15th. That a memorial of the benefactions and augmentations made to each cure shall, at the charge of the corporation, be set up in writing on a stone, to be fixed in the church of the cure so to be increased, there to remain in perpetual memory thereof.

16th. When the treasurer shall have received any sum of money for the use of the corporation, he shall, at the next general court to be holden after such receipt, lay an account thereof before the governors, who may order and direct the same to be placed out, for the improvement thereof, upon some public fund or other security, till they

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have an opportunity of laying it out in proper purchases for the augmentation of cures.

17th. That the treasurer do account annually before such a committee of the governors as shall be appointed by a general court of the said corporation, who shall audit and state the same; and the said account shall be entered in a book to be kept for that purpose, and shall be laid before the next general court after such stating, the same to be there re-examined and determined.

18th. The persons whose cures shall be augmented shall pay no manner of fee or gratification to any of the officers or servants of this corporation.

Additional rules may be made from time to time by the governors.

But in addition to the above, all such rules and orders as shall from time to time be by the governors agreed upon, prepared and proposed to the king, according to the true intent of the said letters patent, and by him approved under his sign manual, shall be as good as if they were established under the great seal.

Grants to the corporation.

Besides the revenue of first-fruits and tenths given to this corporation, they have been empowered to accept from any benefactors, for the same purposes as those of their incorporation, any property in any goods or chattels, whether given by deed or in any other manner, and any estate in lands, &c., which must, however, be granted by deed enrolled in such manner, and within such time, as is directed by the 27 Henry VIII. c. 16, for enrolment of bargains and sales, or by will duly executed. But no incapacitated persons are by the act empowered to give or grant.[t]

Bishops to report as to value of benefices.

The corporation having been created for these purposes, it was found necessary to provide some means by which they might be accurately informed of the benefices which, according to their rules, were to receive augmentation; and accordingly it was ordered by the statute passed in the first year of George I., that the bishops of every diocese, and the guardians of the spiritualties *sede vacante*, should from time to time, as they shall see occasion, as well by the oath of two or more witnesses (which they, or others commissioned by them, under their hands and seals, were empowered to administer), as by all other lawful ways and means, inform themselves of the clear improved yearly value of every benefice with cure of souls, living and curacy, within their several dioceses, or within any peculiars or places of exempt jurisdiction within the limits of their respective dioceses, or adjoining and contiguous thereunto, although the same were exempt from the jurisdiction of any bishop in other cases, and how such yearly values

[t] 2 & 3 Anne, c. 11, ss. 4, 5.

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arise, with the other circumstances thereof; and certify the same under their hands and seals, or seals of their respective offices, to the governors of the bounty.[u] A provision which has been since extended to the case of those livings not exceeding the clear yearly value of 50*l.*, which had been already returned in the manner we have mentioned, for the purpose of being discharged from first-fruits.[x]

Maintenance of curate or incumbent.

As the augmentation is intended for the maintenance not only of parsons and vicars, but also of curates and other ministers officiating in churches or chapels, when any part or portion of the first-fruits or tenths shall be annually or otherwise applied or disposed of towards the maintenance of any minister officiating in any church or chapel, such part or portion shall from thenceforth for ever be in the like manner continued to the minister from time to time so officiating in the same church or chapel; and every such minister, whether parson, vicar, curate or other minister for the time being so officiating in such church or chapel, shall enjoy the same for ever.[y]

House may be built with augmentation money.

Where a living has been or shall be augmented, and there is no parsonage house suitable for the residence of the minister, the governors from time to time may apply the money appropriated for such augmentation and remaining in their hands, or any part thereof, in such manner as they deem advisable, in or towards the building, rebuilding or purchasing a house and other erections within the parish, suitable for the residence of the minister thereof, which house shall be thereafter deemed the parsonage house of such living.[z]

History and future prospects of augmentation.

The augmentation of different benefices by means of this bounty fund is rather matter of history than of law. Its operation, as observed by Mr. Christian in a note upon this subject in Blackstone's Commentaries, has been slow and inconsiderable, for the number of livings certified to be under 50*l.* was no less than 5,597, of which 2,538 did not exceed 20*l.* a year each, and 1,933 between 30*l.* and 50*l.* a year, and the rest between 20*l.* and 30*l.*; so that there were 5,597 benefices in this country which had less than 23*l.* a year upon an average. Dr. Burn calculates that from the fund alone it will require 339 years from the year 1714, when it commenced, before all those livings can be raised to 50*l.*; and if private benefactors should contribute half as much as the fund, (which is very improbable,) it will require 226 years. But even taking this supposition to have been true ever since the establishment, it will fol-

[u] 1 Geo. 1, s. 2, c. 10, s. 1.
[x] 45 Geo. 3, c. 84.
[y] 5 Anne, c. 24, s. 4.
[z] 43 Geo. 3, c. 147, s. 3.

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low that the wretched pittance from each of 5,597 livings, both from the royal bounty and private benefaction, cannot upon an average have yet been augmented 9*l.* a year.[a] Yet it must be observed, that in this calculation he has not taken into consideration the great increase in the rentals of all estates since the valuation of these small livings was made in the time of Queen Anne. Dr. Burn computes the clear amount of the bounty to make 55 augmentations yearly, that is, at 11,000*l.* a year; but Sir John Sinclair[b] says that "this branch of the revenue amounted to about 14,000*l.* per annum." Mr. Christian goes on to make the following suggestion, which would be entitled to more consideration if it were not from the insuperable difficulty of interference with the rights of property where benefices are in private patronage: "If the whole of the profits and emoluments of every benefice for one year were appropriated to this purpose, an effect would be produced in twenty or thirty years which will require 300 by the present plan. This was what was originally understood by the first-fruits, and what actually, within the last 300 years, was paid and carried out of the kingdom to support the superstition and folly of popery. If, upon any promotion to a benefice, it was provided that there should be no vacancy or cession of former preferment till the end of the year, who could complain? The person promoted would be deprived of no right or property which he had previously enjoyed; and even if there were any minds so sanguine as to consider themselves certain of success, it would be but a temporary disappointment of their hopes; and taxes are never paid with so much cheerfulness and alacrity as upon the accession of good fortune. It would certainly soon yield a supply which would communicate both comfort and respectability to the indigent clergy." A great effect would be produced if one half or any considerable portion were so applied.[c]

Conditions and consequences of augmentation.

The conditions upon which certain livings are augmented, and the consequences to those livings of such augmentation, remain to be noticed. And, first, the right of patronage may be changed in consequence of such augmentation; for it is provided, that where the governors give 200*l.* to any cure not exceeding 35*l.* per annum, any other person giving the same or any greater sum in lands or tithes, all agreements with benefactors, with the consent and approbation of the governors, touching the patronage or right of presentation or nomination to such augmented cure, made

[a] 2 Burn's E. L. 268. [b] Hist. Rev. part iii. p. 198.
[c] See the note to Christian's edition of Blackstone, 1 Com. 286.

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for the benefit of such benefactor, shall be good and effectual in law; and the patronage of such augmented churches shall be vested in such benefactors or others as fully as if the same had been granted by the king under his great seal.[d]

Agreements in particular cases.

And provisions are further made for rendering such agreements effectual in cases where they could not be so otherwise,—as agreements made by guardians on behalf of idiots and lunatics; agreements made by parson or vicar, which must be with consent of the ordinary and patron; agreements made by a husband seised in right of his wife, in which case the wife is to be made a party. And all such agreements are as effectual for supplying cures vacant at the time of the augmentation, as for the advowson and nomination to future vacancies.

Agreement with patron for a stipend.

Where it falls to the lot of any living to be augmented, the governors may do so upon certain conditions made with the patron; and before they make the augmentation may stipulate with the patron of any donative, or the impropriator of any rectory, without endowment of vicarage, or parson or vicar of any mother church, for a perpetual, yearly or other payment or allowance to the minister or curate of such living, and for charging with and subjecting the impropriate rectory or mother church or vicarage thereunto in such manner and by such remedies as shall be thought fit; and such agreements made with the king under his sign manual, or others, are rendered valid. And if such impropriator, other than the king, and such parson or vicar, does not make such agreement, the governors may refuse such augmentation, and apply the money for other purposes of the bounty.[e]

Augmented benefices become perpetual cures, and cease to be donatives.

All benefices augmented by the bounty fund become perpetual curacies; so that the ministers thereof become perpetual corporations, and all the incidents to perpetual curacies thereupon attach to them; and all donatives so augmented become subject to the visitation and jurisdiction of the bishop; but the rights of patrons are so far respected in this matter that no donatives can be augmented, so that such a change cannot take place without the consent of the patron under his hand and seal.[f]

[d] 1 Geo. 1, stat. 2, c. 10, s. 8. [e] Sect. 16. [f] Sect. 4, 14, 15.

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BOOK III.

OF THINGS ECCLESIASTICAL.

HAVING now taken a general view of persons ecclesiastical and of ecclesiastical officers, and of the provision made by law for their maintenance, we proceed in order next to consider things spiritual or ecclesiastical; under which head we shall first consider the subject of parishes or districts, into which the whole of this country is divided for ecclesiastical purposes, and for the better and more effectual pastoral superintendence by its ministers. No inconsiderable part of the subject which will be here treated of, is contained in the different Church Building Acts; but it would cause much needless repetition if, in speaking of those subjects, we were to follow out the contents of those acts beyond the subject immediately before us. The difficulty of those acts arises principally from the attempt to digest each act separately. In the present work therefore it has been endeavoured, as far as possible, to treat them as if consolidated, which possibly at some future time they may be, and to refer to them only for each point as it arises in its proper place.

CHAPTER I.

ECCLESIASTICAL PARISHES AND DISTRICTS.

THE ecclesiastical division of England is primarily into two provinces. Each province is divided into dioceses; each diocese into archdeaconries; each archdeaconry into rural deaneries; each deanery into parishes. Of the ecclesiastical person who presides over each of these divisions and subdivisions, we have already spoken in the First Book.

Ecclesiastical division of England.

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But the last division, that of parishes, requires to be here particularly noticed, on account of some important recent alteration in the law.

Parishes.

A parish is that circuit of ground which is committed to the charge of one parson or vicar, or other minister, having cure of souls therein. These districts are computed to be near ten thousand in number. How ancient the division of parishes is, may at present be difficult to ascertain, for it seems to be agreed on all hands, that in the early ages of Christianity in this island parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church; but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some; or if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion.[a]

We find the distinction of parishes, nay even of mother churches, so early as in the laws of King Edgar, about the year 970. Before that time the consecration of tithes was in general arbitrary; that is, every man paid his own (as has been before observed) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying, and with either jealousies or mean compliances in such as were competitors for receiving them, it was now ordered by the law of King Edgar, "*dentur omnes decimæ primariæ ecclesiæ ad quam parochia pertinet.*" However, if any thane or great lord had a church within his own demesnes, distinct from the mother church, in the nature of a private chapel, then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister; but if it had no cemetery, the thane must himself have maintained his chaplain by some other means; but, in such case, all his tithes were ordained to be paid *primariæ ecclesiæ*, or to the mother church.[b]

Boundaries of.

It seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors; since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their

[a] 1 Black. Com. 113. [b] Seldon on Tithes, ch. 2.

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tenants in one or two adjoining lordships; and in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general; and this tract of land, the tithes whereof were so appropriated, formed a distinct parish, which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands, especially if no church was then built in any lordship adjoining to those outlying parcels.[c]

Places extra-parochial.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But some lands, because they were in the hands of irreligious and careless owners, or were situate in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extra parochial.[d]

New divisions of parishes.

Although this original division into parishes remains unchanged, so far as all civil purposes are concerned, yet, in many instances, a considerable change has taken place, so far as regards all ecclesiastical purposes.

Separate parishes.

For if the church building commissioners shall think it expedient to divide any parish into two or more separate parishes for all ecclesiastical purposes, they may, with consent of the bishop of the diocese, under his hand and seal, apply to the patron of the church of the parish for his consent, and upon his signifying it under his hand and seal, they shall represent the whole matter to the king in council, stating the proposed bounds of such division, with the relative proportions of glebe lands, tithes, moduses, and other endowments, and the estimated amount of fees, oblations, offerings, or other ecclesiastical dues or profits within each division; and if his majesty in council shall direct such division to be made, such order shall be valid for effecting such division. But this is not to take effect until the death of the person who is then incumbent; and until his death, the new churches of such divided parishes remain chapels of ease.[e]

Ecclesiastical districts. Consolidated chapelries.

The commissioners are also empowered, with the same consent as last mentioned, to unite and consolidate any such contiguous parts of parishes and places into a separate

[c] 1 Black. Com. 114. [d] Ibid.
[e] 58 Geo. 3, c. 45, ss. 16, 18.

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and distinct district for all ecclesiastical purposes, and to cause such district to be named and ascertained by described bounds; and such name and bounds, when approved by his majesty in council, to be inrolled in chancery, and in the registry of the diocese, and to make grants or loans for building, or to build any chapel, with or without cemeteries, in and for the use of the inhabitants of such district, in such manner and under such regulations as may to the commissioners appear most expedient, and to constitute any such district a consolidated chapelry; and every such chapelry shall be under the superintendence of such spiritual person as shall be appointed to serve any such chapel, and such spiritual person shall have cure of souls in such district; and the right of presentation and appointment of such spiritual person shall thenceforth belong to such persons, and be exercised in such manner as may be agreed by the patrons of the churches or chapels of such parishes and extra-parochial places, with the approbation of the commissioners; and banns of marriage may be published, and marriages, christenings, churchings, and burials, may be solemnized in any such chapel, after the consecration thereof; and the pew rents shall be fixed, and salaries to the minister and clerk assigned therefrom; and all fees and offerings within such chapelry, according to such table of fees as the commissioners shall make, with the approbation of the bishop, may be recovered in like manner as if such chapelry was a distinct parish; and the commissioners shall make compensation in manner directed by said act, for any loss sustained by the incumbent of any contiguous parish or place which shall form part of any such district, by reason of any fees, oblations, and offerings being transferred to the spiritual person serving any such chapel; and all such chapelries shall be deemed benefices, and be subject to the jurisdiction of the bishop and archdeacon where the altar of the chapel shall be locally situate, and to all laws in force concerning presentation and appointment to benefices and churches, and lapse, and all other laws relative to holding benefices and churches.[f]

Apportionment of glebe, &c. in such cases.

In every case where the commissioners shall think it expedient to divide any parish, or extra-parochial place, into separate parishes for ecclesiastical purposes, the commissioners may, with the same consents, apportion the proportion of glebe land, tithes, moduses, or other endowments or emoluments, which it may be expedient to assign to each division, without regard to whether the proportions

[f] 59 Geo. 3, c. 134, s. 6.

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are locally situate, or arise within the division to which they may be assigned, or elsewhere.[g] In all such cases the commissioners may apportion any existing charges on the benefice, and also apportion the fees, &c. to the clerk and sexton.

Where the commissioners may not think it expedient to constitute separate parishes, but that it is expedient to divide into ecclesiastical districts, such division may be made and confirmed by order in council, in the same manner as with separate parishes. And this may be done at separate times, and any extra-parochial place be made a district parish or district chapelry, and subdivisions may be made of the same. But the nomination to a chapel of a chapelry district, so taken from the separate or district parish, is to belong to the incumbent of the separate or district parish out of which it is taken, and the subdivision is not to take effect in his lifetime, without his consent.[h]

Subdivisions of ecclesiastical districts and consolidated chapelries.

Boundaries of new parishes created by any complete division, and of ecclesiastical districts, shall be ascertained, and the description of such bounds enrolled in chancery, and registered in the registry of the diocese, and notice thereof given, as the commissioners shall direct. Upon representation of the commissioners, made with consent of the bishop, signified under his hand and seal, such boundaries may be altered by the king in council within five years after enrolment; which alterations shall be enrolled and registered as aforesaid. Such boundaries shall continue the boundaries of such parishes or districts, and such districts shall become district parishes, and be called by such names as given to them in the instrument enrolled, and shall be separate district parishes, and the churches and chapels assigned to them, when consecrated, shall be district parish churches, for all purposes of ecclesiastical worship and performance of ecclesiastical duties; and as to all marriages, christenings, churchings and burials, and the registry thereof, and in relation to all fees, oblations and offerings, and as to all other purposes, except as in the act excepted. Divisions made into district parishes only are not to affect any land, glebe, tithes, moduses or endowment of the original church: into separate parishes or district parishes, not to affect any parish or place, or the persons residing therein, otherwise than in the act provided, or any poor or other parochial rate, or the persons interested therein, except church rates.[i]

Boundaries of new parishes, &c.

But the boundaries, whether of separate parishes or of

Alteration of the boundaries.

[g] Sect. 8. [h] 58 Geo. 3, c. 45, s. 21; 1 & 2 Vict. c. 107, s. 12.
[i] 58 Geo. 3, c. 45, ss. 22, 23, 24, 30, 31.

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district parishes, or district chapelries, may be altered by an order in council, at any future time, without restriction, upon the representation of the church building commissioners, the requisite consents being obtained.[k]

New district chapelries.

The commissioners may also, in the same manner, and with such consents as required in case of division into ecclesiastical districts, assign a particular district to any chapel of ease, or parochial chapel, already existing: and such districts shall be under the *immediate* care of the curate appointed to serve such chapel, but subject to the superintendence and control of the incumbent of the parish church; and all such curates shall be nominated by the incumbent of the parish to the bishop for his license, except where the nomination shall be vested in another person, and in such case, by that person; subject to all the laws in force relative to stipendiary curates, except assigning to them salaries: provided that the commissioners may, with consent of the bishop, determine whether any and what part of the fees or dues for marriages, baptisms, churchings and burials shall be assigned to such curate, and whether banns of marriage shall be published, and marriages or baptisms, churchings or burials shall be solemnized in any such chapel or not, and in any case in which marriages shall be allowed in any such chapel, the commissioners shall cause the boundaries of the district assigned to such chapel to be enrolled in the Court of Chancery and in the registry of the diocese, and no such chapelry shall become a benefice by reason of any augmentation of the maintenance of the curate by any grant or bounty under any act for augmenting small livings.[l]

All acts, laws and customs relating to publishing banns of marriage, marriages, christenings, churchings and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, shall apply to all districts and consolidated or district chapelries, and divisions of any parishes or extra-parochial places, whereof the boundaries shall be enrolled in chancery, and in the churches and chapels whereof banns shall be allowed to be published, and marriages, christenings, churchings or burials shall be allowed to be solemnized, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls therein, or serving the same, in like manner as if the same had been ancient, separate, and distinct parishes and parish churches by law.[m]

District chapelry may be made a separate parish.

And whenever such a district as last-mentioned has been assigned, it shall be lawful for the commissioners,

[k] 3 & 4 Vict. c. 60, s. 6. [l] 59 Geo. 3, c. 134, s. 16. [m] Sect. 17.

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with consent of the ordinary, patron and incumbent, or on refusal of the incumbent, with consent of the ordinary, on the next avoidance, to convert any such district chapelry into a separate and distinct parish for ecclesiastical purposes, or into a district parish, where a suitable residence and competent maintenance can be procured and established for the minister and his successors; and compensation shall be provided, to the satisfaction of the commissioners and incumbent, for all fees, oblations, offerings and ecclesiastical dues, which may, by such conversion, be transferred to the minister of such separate and distinct or district parish; and such conversion shall be made under the seal of the commissioners, and registered in the registry of the diocese, and enrolled in chancery, and a duplicate lodged in the chest of the church of the original parish, and in the church or chapel of the separate or district parish.[n]

Subdivision of district chapelries.

And if at any time it appears expedient, such district chapelries may be subdivided into other district chapelries, in like manner as they might have been originally divided; and, in such case, the right of nomination to the chapel or chapels of such new district chapelry or district chapelries, shall be exercised by the incumbent of the parish out of which such first assigned district chapelry shall have been taken, unless the right of nomination thereto shall be legally vested in some other party; and, in that case, such right of nomination shall belong to him or them, or to such party or parties as shall be agreed upon by him or them, and the said commissioners, with consent of the bishop; and the chapel or chapels of such new district chapelry or district chapelries shall respectively be subject to the provisions and regulations respecting district chapelries.[o]

District may be assigned to any church or chapel.

The commissioners may also assign a district chapelry to any church or chapel, requisite consent being obtained, in the same manner as above-mentioned; and the governors of Queen Anne's Bounty may augment such church or chapel, either before or after such district chapelry has been founded or assigned.[p]

Chapelries, if chapels of ease, may be made separate parishes.

If any person is willing to endow a chapel of ease with such a provision as the bishop shall deem sufficient to ensure a competent provision for the minister, it shall be lawful for the bishop, with the consent of the patron and incumbent of the parish, by writing under his hand and seal, to declare that such chapel, when so endowed, shall thenceforth be separate from and independent of the parish

[n] 3 Geo. 4, c. 72, s. 16.
[o] 3 & 4 Vict. c. 60, s. 1.
[p] 2 & 3 Vict. c. 49, s. 3.

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church; and that the chapelry, township or district belonging or supposed to belong thereto, shall be thenceforth a separate and distinct parish for all spiritual purposes.[q]

Division of districts for certain specified ecclesiastical purposes only.

In certain cases, where new churches have been built and endowed, the commissioners may assign a district, which shall be under the immediate care of the minister who shall have been duly licensed to serve such church or chapel, so far only as regards the visitation of the sick and other pastoral duties, and shall not be deemed a district for any other purpose whatsoever: provided that it shall be lawful for the commissioners, with the consent of the bishop of the diocese, in all such cases as shall come before them, and for the bishop alone in all other cases, to determine whether baptisms, churchings or burials shall be solemnized or performed in any such church or chapel, or not; and the commissioners or bishop respectively, as the case may be, shall cause a description of the boundaries of the district assigned by them to such church or chapel to be registered in the registry of the bishop of the diocese; and shall also cause their order and direction in writing, as to all offices to be performed in any such church or chapel, to be registered in the registry of the diocese.[r]

Probable effect of the Church Endowment Act.

All the newly constituted ecclesiastical divisions of this country, by whatsoever name they may be called, whether parishes, districts, or chapelries, have hitherto been made under some of the above-mentioned provisions; and there will still be very many cases in which the divisions and subdivisions of parishes, &c., for ecclesiastical purposes, must be made under and regulated by those provisions. But although those provisions are not in any manner superseded, they will probably be less frequently had recourse to in the future divisions of parishes, in consequence of the provisions recently made by the Church Endowment Act, by which in many cases (although, as it will be observed, not in all) the same purposes may be effected.

New districts formed by the ecclesiastical commissioners.

For now, if at any time it shall be made to appear to the ecclesiastical commissioners that it would promote the interests of religion, that any part or parts of any parish, chapelry, district, or any extra-parochial place, should be constituted a separate district for spiritual purposes, it shall be lawful, by their authority, with the consent of the bishop of the diocese, under his hand and seal, to set out by metes and bounds and constitute a separate district accordingly, such district not then containing within its limits any consecrated church or chapel, in use for the

[q] 1 & 2 Will. 4, c. 38, s. 23. [r] 1 & 2 Will. 4, c. 38, s. 10.

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purposes of divine worship, and to fix and declare the name of such district: provided that the draft of any scheme for constituting any such district shall be delivered or transmitted to the incumbent, and to the patron or patrons, of the church or chapel of any parish, chapelry or district, out of which it is recommended that any such district should be taken, in order that such incumbent, patron or patrons, may have an opportunity of offering or making to the commissioners, or to such bishop, any observations upon or objections to the constituting of such district; and that such scheme shall not be laid before her majesty in council until after the expiration of one calendar month next after such copy shall have been so delivered or transmitted, unless such incumbent, and patron or patrons, shall in the meantime consent to the same: provided also, that in every scheme for constituting any such district, the commissioners shall recommend to her majesty in council that the minister of such district, when duly licensed, shall be permanently endowed, under the provisions of that act, to an amount of not less than the annual value of 100*l.*; and also, if such endowment be of less than the annual value of 150*l.*, that the same shall be increased, under the like provisions, to such last-mentioned amount at the least, so soon as such district shall have become a new parish.[s]

The maps, &c., of the new district.

A map or plan, setting forth and describing such metes and bounds, shall be annexed to the scheme for constituting such district, and transmitted therewith to her majesty in council, and a copy thereof shall be registered by the registrar of the diocese, together with any order issued by her majesty in council for ratifying such scheme; but it shall not be necessary to publish any such map or plan in the London Gazette.[t]

Upon any such district being so constituted, a minister shall be nominated thereto and licensed, and shall have power to perform within such district all such pastoral duties appertaining to the office of a minister, according to the rites and usages of the united Church of England and Ireland, as shall be specified and set forth in his license; and when a building shall be licensed within such district for divine worship, he shall also perform such services and offices as shall be specified and set forth in the same or any further license granted in that behalf by the bishop of the diocese; and such minister shall perform such pastoral duties, services and offices respectively, independently of the incumbent or minister of the church of any parish, chapelry or district, out of which such new

[s] 6 & 7 Vict. c. 37, s. 9. [t] Sect. 10.

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district or any part thereof shall have been taken; and shall, so far as the performance of the same may be authorised by such license or licenses, have the cure of souls in and over such new district: provided that no burials shall be performed in such licensed building, and that nothing shall empower such bishop to include in such license the solemnization of marriages.

The new district is to become a new parish, when the church is consecrated.

When any church or chapel shall be built, purchased, or acquired in any district constituted as aforesaid, and shall have been approved by the commissioners by an instrument in writing under their common seal, and consecrated as the church or chapel of such district for the use and service of the minister and inhabitants thereof, such district shall, from and after the consecration of such church or chapel, be a new parish for ecclesiastical purposes, and shall be known as such by the new name of "The new Parish of ——," instead of "The District of ——," according to the name already fixed for such district; and such church or chapel shall become and be the church of such new parish accordingly, and any license granted by the bishop, licensing any building for divine worship, shall thereupon become void; and it shall be lawful to publish banns of matrimony in such church, and, according to the laws and canons in force in this realm, to solemnize therein marriages, baptisms, churchings, and burials, and to require and receive such fees upon the solemnization of such offices, or any of them, as shall be fixed by the chancellor of the diocese in which such new parish shall be situate; and which fees, and also the fees for churchings to be received by the minister of such district, such chancellor is empowered and required to fix accordingly; and the like Easter offerings and dues may be received within the limits of such new parish, by the perpetual curate thereof, as were before payable to the incumbent of the church of the principal parish, of which such new parish originally formed a part.

All the laws ecclesiastical in respect of the ordinances of the church are to be in force in the new parish, but the perpetual curate is not to receive any fee for baptism or for registering baptisms.[u]

[u] Sect. 15.

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CHAPTER II.

OF CHURCHES.

SECTION 1.

Cathedral and Collegiate Churches.

CATHEDRAL churches were probably unknown in England prior at least to the time of the Emperor Constantine; but, after his conversion, the other converts in those days and in the following times, who were many of them governors and nobles, settled lands of considerable extent upon those who converted them; and the first oratories, or places of public worship, are said to have been built upon those lands. These first oratories were called *cathedræ* or *sedes;* cathedrals, sees or seats, from the clergy's constant residence thereon; and it is said that every town which hath a see of a bishop placed in it is thereby entitled to the honours of a city;[a] but, query, whether it is not also necessary that it should be a borough incorporate, and whether the new sees erected, or to be erected, under the authority of the ecclesiastical commission, and some of the Welsh sees, would rightly confer the name of city on the places wherein they are situated? Origin of cathedrals.

The distinction between cathedral and collegiate churches consists principally in the see of the bishop at the former, for a dean and chapter are common to both; and while cathedrals are subject only to the visitation of the archbishop, and to the king, when the archbishopric is vacant, collegiate churches are visitable by the bishop of the diocese, unless where it has been expressly provided otherwise by the founder; consequently, every cathedral or see, so soon as it is erected, is exempt from and independent of the visitation of the archdeacon. Thus, a bishop's see having been newly erected within the limits of a certain archdeaconry, it was represented that the archdeacon had presumed to exercise his jurisdiction over the bishop there consecrated, and the church; and Gregory IX. decreed thereupon, that this should no more be done, but that the bishop should be exempt from the archidiaconal jurisdic- Exempt from the archdeacon's jurisdiction.

[a] Godolph. Abr. 347; 1 Inst. 109.

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tion.[b] And as this decretal epistle became a part of the canon law, it may be presumed that the same would now be held in the case of any new sees erected under the recommendation of the ecclesiastical commission.

Besides the proper revenues of cathedral churches to be applied towards the repairs thereof, there are divers forfeitures by the several canons of Archbishop Stratford to be applied to the same purpose; namely, for the unfaithful execution of wills, for extorting undue fees for the probate of wills, and half the forfeitures for excessive fees at the admission of curates; and also the *cathedraticum*, which is or formerly was paid in honour of the cathedral church, and in token of subjection to it, by every parochial minister within the diocese.

Cathedraticum.

This annual pension, as it has been called, is restrained by the canon law to two shillings at most from each parish, and it has been sometimes called *synodaticum* or *synodals*, because generally paid at the bishop's synod at Easter; but all these payments are now fallen into disuse, and such claims could not now probably be successfully revived.

The cathedral the parish church of the diocese.

Yet, notwithstanding the discontinuance of this acknowledgment, the cathedral church is the parish church of the whole diocese; which diocese was, in fact, anciently called *parochia*, until the application of this name to the lesser branches, into which it was divided, made it, for distinction's sake, to be called only by the name of diocese; and it has been affirmed therefore, that if one resort to the cathedral church for the purpose of hearing divine service, it is a resorting to the parish church within the sense and meaning of the statute; and this further appears, for that it is ordained by a canon of Archbishop Mepham, that, in certain cases, they who cannot be cited personally nor in their dwelling-house, may be cited in their parish church, and if they have no parish church, or that does not appear, then they shall be cited in the cathedral; and that also by canon 65, that excommunicates shall be denounced every six months, as well in the parish church as in the cathedral church of the diocese.[c]

Ornaments which go to the successor.

The see of a bishop is entitled to the ornaments of the chapel at his decease; and although other chattels belong to the executor of the deceased, and shall not go in succession, yet the ornaments of a chapel of a preceding bishop are merely in succession;[d] and this is agreeable to analogy, for ordinary things erected in the church for the honour of the dead person shall go to his heir as heirlooms, as in manner of an inheritance.

[b] Gibs. 171. [c] Ibid. [d] Ibid.; *Corvin* v. *Pym*, 12 Rep. 186.

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New cathedrals.

Of the bishoprics of the new foundation we have before spoken; as to the cathedral churches of the same it was enacted,[e] that the king should have power to declare by letters-patent, or other writing under the great seal, such number of cities, sees for bishops, cathedral churches and dioceses, by metes and bounds, as shall appertain, and out of the revenues of the dissolved monasteries to endow them in such manner as he should deem expedient; and, as to such cathedral churches, it will be sufficient to observe that the law regarding them differs not from that regarding the churches of the old foundation.

The collegiate church of Ripon is now made a cathedral church, and the chapter is invested with the rights and powers of other cathedral churches; consequently, the visitation of the bishop is exchanged for that of the metropolitan of the province, and it has become exempt from the archidiaconal visitation;[f] and provision has also been made for an episcopal residence and demesne for the see. The collegiate church of Manchester will probably be shortly changed in like manner.

Section 2.

Parish Churches.

Definition of a parish church.

Of churches, other than cathedral and collegiate, by far the largest proportion, as well as the most important, are those of the different parishes. If a church or chapel has a public cemetery belonging to it, a communion table, pews in right of houses, christenings there, and Easter dues paid its minister, these things are strong to show that it is a parochial church or chapel;[g] to which definition there should probably be added, that the church should have existed from time immemorial, and that the inhabitants of the district belonging to it should never have contributed to the repairs of a mother church; for these things would show it to be a chapel only, dependant upon some mother church. According to Degge and Kennet, baptism and sepulture are proofs of a parochial chapel, and this is true, but they are certainly not sufficient proofs; and this will be seen by what is said of this subject under the title of church rates.[h]

Different kinds of.

The test or definition by which a parish church or chapel may be tried is of course not applicable to parish churches

[e] 31 Hen. 8, c. 91.
[f] Order in Council, dated 5th October, 1836.
[g] *Ex parte Greenhouse*, 1 Madd. 108.
[h] See also *Craven* v. *Saunderson*, 7 Ad. & Ell. 880.

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declared so by special or general acts of parliament, and, as well for many practical purposes, as here for more easy consideration, parochial churches may be thus classed; namely, original parish churches, substituted parish churches, separate parish churches, and new district parish churches.[i] It will be obvious, however, that the greater part of what we shall have here to remark will be equally applicable to all, since all are parochial churches equally.

Original parish churches.

The ancient manner of founding churches of this kind was, that the intended founder made application to the bishop of the diocese and obtained his license, then the bishop or his commissioners set up a cross, and set forth the ground where the church was to be built; and then the founders might proceed in the building of the church, and when the church was finished the bishop was to consecrate it.[k]

No person therefore could erect a church without leave of the bishop; and after it is erected the law takes no notice of it as a church until it is consecrated by the bishop; for this reason, therefore, the question of a church or not a church, a chapel or not a chapel, is to be tried and certified by the bishop.[l] But if the question be whether, admitting it to have been consecrated, it be a church or only a chapel, such a question would not be triable in the ecclesiastical courts, and prohibition would lie, for such a question shall be tried by the country.[m]

Consecration of churches.

The consecration of churches was first enjoined by Eugenius, the first priest of Rome who styled himself the pope, in the year 154, and this was aftewards enforced in this country by a constitution of Othobon.[n]

In cases of urgent necessity it appears that, by consent of the bishop, divine service might be preformed and the sacraments administered in churches and chapels not consecrated; as where the church was destroyed by fire, and service performed in tents, or in the open air, before the consecrated altar; and more especially where a church was shut up and under repair, and banns had been published in the church of an adjoining parish, a marriage solemnised on the site of the old church was held good.[o]

Endowment to be first provided.

And no church may be consecrated until a competent endowment is provided; and the canon law goes further, requiring the endowment to be made not only before con-

[i] See the several church building acts; and ante, Book III. Ch. I.; see also the Church Endowment Act.

[k] Still. E. C.; 1 Burn's E. L. 323.

[l] 3 Inst. 203.

[m] 2 Roll. Abr. 291; Wats. c. 23.

[n] 1 Burn's E. L. 324.

[o] *Stallwood* v. *Tredgar*, 2 Phill. 292.

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secration, but to be ascertained and exhibited before they begin to build.[p] This endowment in the old churches was commonly made by the lord of the manor, by an allotment of the manse and glebe; and other persons also at the time of the dedication often contributed small portions of land, which is the reason why, in many parishes, the glebe is not only distant from the manor, but is in remote divided parcels.

Form of consecration.

It does not appear necessary here to say much as to the form of the consecration, for it is to be found in some of the Books of Common Prayer; and this is now usually, or perhaps universally used, and is the form sent down by the bishops in 1712 to the lower house of convocation, and altered and afterwards agreed to; yet it never received the royal assent, and consequently is not enjoined to be observed; and in fact, although it might be unwise to depart from what has been prescribed by far weightier authority than could now be obtained, and from what has in addition been sanctioned by custom, yet in our Church at the present day every bishop is left to his own discretion as to the form he might choose to observe in the consecration of churches.[q]

Reconsecration and reconciliation.

If a church has been polluted by the shedding of blood, it seems there should be a reconciliation; and if it has been entirely or almost entirely destroyed by fire, a reconsecration; but if the walls were entire and the communion table not injured, then there ought to be no reconsecration: and where a chapel at Hereford had for some time been applied to secular purposes, and had been made a stall for cattle, and a place for laying up provender, yet, as the walls were entire, a reconciliation and not a reconsecration was deemed proper.

But where the church at South Malling had been polluted in a similar manner, and had been also rebuilt, and then used for divine services, the minister, churchwardens and parishioners were interdicted by the archbishop from entering the church until there had been a reconsecration. In a case where a reconciliation was judged sufficient, the tenor of the reconciliation was, "The same chapel from all canonical impediment, and from every profanation (if any there were) contracted and incurred, as much as in us lieth, and so far as lawfully we may by the authority aforesaid, we do exempt, relax and reconcile the same."[r]

Probably there is no very certain rule which could be

[p] Gibs. 189.
[q] The form is set out very fully in Dr. Burn's work on Ecclesiastical Law.
[r] Gibs. 189.

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laid down as to the cases in which reconciliation or reconsecration would be proper; but if any precedent may be derived from the cases mentioned, wherever a church has been rebuilt, it would seem proper that there should be a reconsecration; for it would appear from the form of consecration that it is not the soil only on which the church is built, but the walls and the whole building that are consecrated; and consequently the new building, though upon the old site, would as much require to be consecrated as if it had been erected elsewhere.

A church having once been consecrated, and by that solemn rite dedicated to the service of God, and separated from all unhallowed uses, cannot be unconsecrated but by act of parliament.[s]

Fabric of the church.

Parochial churches may be said generally to consist of four parts: the belfry tower or steeple—the chancel—the nave or body of the church—and the aisles. These parts form the fabric of the church, which has been said to consist of the walls, windows, and covering; and each of these parts we shall consider briefly before we speak of the pews, goods, utensils, or ornaments contained in them.

Tower or belfry.

With regard to the tower or belfry very little is to be found in our books; but it has been established that it is part of the church itself; for where a church was injured by lightning, and the parish repaired the body and the roof, but refused to rebuild the spire, the ecclesiastical court issued a monition to repair and reinstate; and it being suggested that there were insurmountable difficulties, the court said if there were such, reference must be had to the court.[t]

The chancel.

The chancel, *cancellus*, seemeth properly to be so called *à cancellis*, from the lattice-work partition betwixt the quire and the body of the church, so framed as to separate the one from the other, but not to interrupt the sight.[u] At the time of the Reformation this distinction between the chancel and the body of the church was fiercely attacked as tending only to magnify the priesthood. But though the king and parliament yielded so far as to allow the daily service to be read in the body of the church, if the ordinary should think fit, yet they would not allow the chancel itself to be taken away or altered;[x] and therefore it is by the rubric ordained that the chancels shall remain as they have done in times past. And as divine service was formerly performed by the minister in the chancel, it thus

[s] See *Exparte Greenhouse*, 1 Madd. 108.
[t] *Lord Maynard* v. *Brand and Philpot*, 3 Phill. 501.
[u] 1 Burn's E. L. [x] Gibs. 199.

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came to be considered more peculiarly and especially belonging to him. And Lord Coke says, in the chancel the freehold is in the parson, and is parcel of his glebe;[z] yet it appears now to be clearly established that this is not so; and that whatever property or right the parson or rector may have in the chancel, he has *not* that full and exclusive property which he may be said to have in his glebe; for the jurisdiction of the ordinary extends to the chancel as well as to other parts of the church; and it would be most inconvenient if it were not so; for when lay impropriations began, the rights and property in the chancel passed to the lay rectors: and it is this which in fact has given rise to frequent litigation on the subject; and it now seems to be decided that the rector has the freehold in the chancel in the same way as, and no further than, he has in the church and the churchyard. He is not therefore entitled as of right to make a vault or affix tablets in the chancel without leave of the ordinary; nor is he entitled to a faculty for such purposes without laying before the ordinary the particulars, in order to satisfy him that the tablets or vault will not interrupt the parishioners in the use and enjoyment of the chancel. The burden of repairing the chancel, in the absence of a custom to the contrary, rests of common right on the rector; but so also the parishioners are bound of common right to repair the body of the church;[a] but as this confers no right on the parishioners to oust the jurisdiction of the ordinary, so neither does it confer a similar right in the rector. And as to the *use* of the chancel, it clearly belongs to the parishioners for the decent and convenient celebration of the holy communion, and the solemnization of marriage.[b]

Parson's right to the chancel.

Right to the use of the chancel.

This however is during the administration of divine service only, for the possession of the whole church is in the minister and churchwardens; and no person has a right to enter it, when not open for divine service, except by their permission.[c]

Several different origins have been proposed for the word nave; the most simple as well as the most probable of which appears to be that of ναος, as pronounced with the digamma; ναυς has also been suggested; and it is singular that in some of the modern languages the word by which this part of the church is signified is the same as that signifying a ship. Dr. Burn says it is a Saxon word, nave or

The nave.

[z] *Brownlow* v. *Goldsborough*, Ought. 4.
[a] See 3 M. & R. 389.
[b] Sir J. Nicholl, in *Rich* v. *Bushnell*, 4 Hagg.
[c] *Jarrett* v. *Steele*, 3 Phill. 170.

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nap, and probably signifies the middle of a wheel, being that part in which the spokes are fixed, and is from thence transferred to signify the body or middle part of the church.

The freehold of the nave or body of the church is in the parson, who would consequently be the proper person to bring an action against any one injuring or carrying away that which is part and parcel of or affixed to the freehold; but custom or the common law has cast the burden of repairing it upon the parishioners. And as the freehold is in the parson, he has a special duty upon him to see that the body of the church is well and sufficiently repaired, and that rates for that purpose are duly made.[d] The parishioners have a right to the use of the body of the church at such times as it is properly open, and this whether they make any payment to the rates or not:[e] a right which must be borne in mind when we come to the important subject of the seats or pews in the church, and the right to the disposal or occupancy of them.

The aisles.

The word aisle is probably derived from the French *aile*, *ala*, or wing; for the Norman churches were built in the form of a cross with the nave and two wings.

When private property.

An aisle is frequently established as belonging either wholly or in part to private families or individuals, or rather to particular estates within the parish, the owners of which it is presumed originally erected the aisle for the accommodation of their household, which their successors in the estate claim as appurtenant to the ancient mansion or dwelling-house; but in order to complete such exclusive right, it is necessary not only that it should have existed immemorially, but that the owners of the estate, in respect of which it is claimed, should from time to time have borne the expense of repairing that which they claim as having been set up by their predecessors; for the constant sitting and burying in the aisle alone, without reparation, will not gain any peculiar property therein; but the aisle having been repaired at the common charge of the parish, the common right of the ordinary takes place, so that he might appoint whom he pleased to sit there, notwithstanding any usage to the contrary.[f]

In these cases it is presumed that the aisle was originally erected by the person to whose estate it is attached, with the consent of the parson, patron and ordinary; but, for the reasons we have before mentioned, no such title to an aisle can be good if the prescription be to a man and his

[d] 3 Phill. 35. [e] 1 Hagg. 317.

[f] See 3 Inst. 202; *Francis* v. *Ley*, Cro. Jac. 366; *Buston* v. *Bateman*, Sidef. 88; *May* v. *Gilbert*, 2 Bulst.; *Fuller* v. *Lane*, 2 Add. 433; Degge, 144.

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heirs; but the aisle must always be supposed to be held in respect of the house, and will always go with the house to him that inhabits it.[g]

Consequences of.

It was said in a modern case by Sir J. Nicholl, "The parish church of L. appears to be an old collegiate church, with three chancels, as they are called, or more properly aisles; the number of pews in these aisles is twenty-three, but the aisles themselves, and the pews in them, are the mere private property of three several parishioners who keep them in repair, and the sittings in these aisles are not open in any sense to the general accommodation of the parishioners:[h] and it being thus clearly established that there may be such a right, if any disturbance of it were to take place, the owner would have his remedy by action at common law against the trespasser, whether it were the ordinary or one of the parishioners.[i]

And as the aisles themselves and the seats in them may, according to the words above quoted, be mere private property, it seems that they may be held by persons not resident in the parish, or that they may be prescribed for as annexed to a house situate out of the parish;[k] being therefore in this respect altogether different from the private pews and faculty seats in the body of the church, to be presently spoken of.

Altering and enlarging churches for increased accommodation.

If increased accommodation in a church is required, and might be provided by means of alterations made, the churchwardens ought to apply for a faculty or license from the ordinary for that purpose. And this is the only way in which alterations or enlargements in a church can be legally effected.[l] If the population of a parish has so increased that the church is unequal to general accommodation, an extension of the buildings, or a more convenient application of the space within, must be resorted to. In granting a license or faculty for either of these purposes, the court would consider the expense to the parish; whether the symmetry and proportions of the church would be violated by the alteration, and whether the inside would be rendered dark and incommodious. It would also pay great attention to the fact that it was against the wishes of the majority of the inhabitants, although not bound by such a circumstance, and it would also pay the same due attention to the opposition of the incumbent, although neither will that necessarily sway the decision of the court, for the court is not bound to regard it.[m]

[g] 12 Coke, 106; 1 B. & A. 498; 1 Sid. 88; 5 T. R. 298.
[h] *Fuller* v. *Lane*, 2 Add. 433.
[i] *May* v. *Gilbert*, 2 Bulst. Coke, J.
[k] 2 Add. 424; 5 B. & C. 18; 1 Hagg. 321.
[l] Gibs. Cod.
[m] See 1 Phill. 233; 1 Hagg. Consis.; 2 Add. 429.

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And it follows from the fact that the decision of the court in such cases is independent of the wishes of the parishioners or of the incumbent, that if alterations were ordered by a vestry, and a faculty were applied for to confirm them, it would matter little whether the vestry had been legally constituted. Thus in a case where a vestry-room and gallery had been added in a parish church by an order of vestry, and an application made for a faculty approving and confirming the work, it was objected that the vestry giving the order had not been assembled on a legal notice, none having been affixed on the church door, conformably to 58 Geo. III. c. 69, s. 1, and that the alterations were unnecessary; but it was proved that the notice of vestry was published in the church; that it was held in the usual manner, and continued by adjournment; that the general concurrence of the parish was evident; that the objection was not taken till long after, when disputes had arisen upon other subjects; and that there was a want of increased accommodation. Upon consideration of the case, the court asked the counsel whether they could hope to maintain, with success, either that a faculty could not legally be granted, or that it would not be a proper exercise of the discretion of the ordinary to confirm the erection of these useful accommodations in the church of an opulent and populous parish. The case coming on, on appeal, the counsel consented to a reversal of the sentence of the court below, which had refused a faculty, upon an understanding that no costs should be given, with a view to promote harmony and reconciliation.[n]

In cases of dispute.

If there should be any dispute in a parish as to whether increased accommodation in the church be necessary, and as to where, and in what manner it should be effected, then

When no dispute.

the ordinary is the sole judge in such a case. But if the incumbent, churchwardens and parishioners were unanimously of opinion, that such increased accommodation was necessary, and that it should be made in a particular part, it seems that there is no necessity for the interposition of the ordinary; for as there is no controversy, there can be no need of a judge:[o] but it cannot by this be intended that the ordinary might not interpose, if he thought proper, or that it would not be his duty to interpose, if he considered the symmetry or beauty of the church to be in any manner violated by the alteration.

What detriment might be permitted to gain increased accommodation.

It is not easily to be deduced from the decided cases, what kind of detriment to the church would be sufficient

[n] *Thomas and Hughes* v. *Morris*, 1 Add. 470.

[o] Johns. 163; Ayl. Parer. 484; Rogers's E. L. 171.

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to induce the court not to decree a faculty for the purpose of making the proposed alterations; for generally it may be supposed that no alteration, such as erecting galleries, or filling up the open space with pews, could be made without some detriment to the fabric of the church, or without in some degree destroying its beauty and symmetry.

In a case where a large majority of parishioners assembled in vestry voted that an application should be made to the ordinary for a faculty to erect a gallery for the accommodation of the increased population of the parish, which increase was distinctly proved by the building of new houses, and the many applications to churchwardens for pews, which they were unable to satisfy from want of room; it was objected that such a gallery would endanger the fabric and darken the pews, but not that the expense would burthen the parish, nor that the symmetry and proportion of the church would be violated: the objections made were rebutted, and the faculty was decreed without costs.[p] And it is presumed, that every such case will be decided on its own peculiar grounds, and that no general principle would be applicable.

It follows necessarily from what has here been said, that nothing could justify the incumbent or the parishioners separately, and from the mere wish of one of them, without the concurrence of the others, and without the authority of the ordinary, in making any such alterations as have been mentioned.

If the vestry and the bishop and incumbent are all consenting, but not otherwise, the churchwardens may borrow and raise on the rates money necessary for defraying the expenses of enlarging the accommodation in churches or chapels, making rates for payment of the interest, and providing a fund of not less than the interest annually for repayment of the principal, or for repaying the principal in any other manner that may be agreed upon; and where a church is thus enlarged, one-half of the additional accommodation thus obtained shall be allotted to uninclosed or free seats;[q] but this subject will be found afterwards more fully treated of under the head of church rates.

[p] *Groves and White* v. *Rector of Hornsey*, 1 Hagg. R. 188.
[q] 58 Geo. 3, c. 45.

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Section 3.

Of Chapels and Churches not Parochial.

What is a chapel.

The definition of the term chapel is by no means so easy now as formerly, since many chapels of ease have become, in effect, churches, under the provisions of the church building acts; many more are in the course of being so converted; and the church building acts, in many instances, speak of churches and chapels indiscriminately.

Some kinds of chapels, however, there are, as to which no change has taken place, as private chapels; but of the law relating to these, there is not much to be observed.

Private chapels.

Private chapels are those of which several are existent in this country, which have been founded by wealthy persons residing at some distance from their parish church. No obligations whatever in respect of them are entailed upon the inhabitants of the places where they may have been built; but the chapels themselves, with their ornaments, &c. and the ministers officiating therein, are maintained entirely at the expense of the individual to whom they belong. Such chapels have no certain endowment, and, consequently, the minister has no freehold in his office; but the owner of the chapel may dismiss him at any time he thinks proper, and appoint another in his place.[r] But, practically, they are not altogether free from the control of the ordinary; for a minister cannot officiate in these chapels, more than elsewhere, without a license from the ordinary, who may, therefore, by refusal of the license, have some control over the appointment: nor can divine service be performed in any building of this kind, unless it is licensed for that purpose by the bishop, who in the license may express any particular services which he authorises to be performed there.[s] In giving directions as to the service to be performed in chapels of this kind, the canon law appears very careful lest such service should lead to the desertion of the parish church; and therefore directs, that the chaplains of such places shall preach and administer the communion very seldom on Sundays and holidays, so that both the lords and masters of the said houses, and their families, may resort to their parish churches, and there receive the holy communion, at least once every year.[t]

Free chapels.

Free chapels are of the same nature as private chapels,

[r] 4 Barn. & Cres. 573. [s] 1 Burn's E. L. 296; and see Lindw. 283.
[t] Canon 71; see 23 Eliz. c. 1.

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except that, originally, they were probably all of royal foundation. Bishop Tanner, as quoted by Dr. Burn, says of them, "free chapels were places of religious worship, exempt from all ordinary jurisdiction, save only, that the incumbents were generally instituted by the bishop, and inducted by the archdeacon of the place. Most of these chapels were built upon the manors and ancient demesnes of the crown, whilst in the king's hands, for the use of himself and retinue, when he came to reside there. And when the crown parted with those estates, the chapels went along with them, and retained their first freedom; but some lords having had free chapels in manors that do not appear to have been ancient demesne of the crown, such are thought to have been built and privileged by grants from the crown."[u]

Proprietary chapels.

Another anomalous kind of chapel, unknown to the constitution and to the ecclesiastical establishment of the Church of England, but which, in more recent times, has become very common, is that of proprietary chapels. In a matter of such recent origin, and which has been so truly termed an anomaly, there is little to be said with certainty; and of the ministers officiating in such chapels, we have already spoken in the first book.[x] As regards the chapels themselves, they have hitherto been, for the most part, unconsecrated, but not universally; and there appears to be no certain rule upon the subject, each case probably depending upon the discretion of the bishop, and the wishes of the proprietors. Such chapels have no sort of parochial rights; and, like the private chapels already mentioned, no burthen whatever can be entailed upon the inhabitants of the place where they are situated, in respect of them; the repairs are the care of the owners and proprietors, and if the chapel should become out of repair, or if the pews should be unlet, and the proprietors should deem their speculation unprofitable, they might, if they pleased, close the building as a chapel for religious worship; or, supposing it not to have been consecrated, might convert it to any purpose they deemed more profitable:[y] but if any building has been once consecrated, it could not be converted to secular purposes, nor could it become again unconsecrated, except by special act of parliament.[z]

It may be observed that, whenever any circumstances connected with such chapels have come before the courts, they appear to have been rather unfavourably regarded; and seem to have been considered as innovations, which it

[u] Tanner's Notit. Monast. Pref. 28.
[x] Chap. VIII. sect. 9.
[y] See *Hilcoat* v. *Moysey*, 2 Hagg. 50.
[z] Ante, sect. 2.

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was not desirable to encourage: as Dr. Lushington observes, "they have arisen from the increase of population, and from the necessity of the times; but if under the church building acts other churches and chapels were to be consecrated, according to the law of the Church of England, the necessity for these chapels would cease."[a] In such a case the bishop would probably refuse to renew his license to officiate in these buildings; and the church would no longer be scandalized by the existence of recognized companies making joint stock speculations upon the religious feelings of their neighbours.

Chapels of ease.

In speaking of the different divisions into which many parishes have recently been divided, we have already observed, that to several chapels ecclesiastical districts have been assigned, such chapels in that case lose their character of chapels of ease, with all the various restrictions to which, as such, they would be subject; and are thenceforth, in point of law, to be considered as parochial churches so far as ecclesiastical matters are concerned. Several of the old chapels of ease, however, still remain unchanged; and some of the new churches, built under the church building acts, are also chapels of ease temporarily. For as to these last, in cases where parishes have been divided, and new churches built, which are intended to become the churches of the new divisions, whether by the name of parishes or districts, it is nevertheless provided, in many cases, that such divisions shall not take complete effect until the death of the existing incumbent; and that, during such incumbency, the new churches shall be deemed chapels of ease.

Under church building acts.

Chapels of ease may also become such, under the church building acts, in cases where from local circumstances it may be thought advisable to convert a chapel of ease, already existing in a parish, into the parish church, and to convert the parish church into a chapel of ease: which the church building commissioners, with the consent of the bishop, patron, and the vestry of the parish, are entitled to do; so that the change may take place upon the next avoidance; or, if the incumbent consents, in addition to the above named, then the change may be made during his incumbency. But in chapels of ease which become such in this manner, the chancels continue to be repaired by the persons who were liable to repair them before the change.[b]

The first of the church building acts gave authority to the commissioners, in cases where they might think it expedient, to build or aid in the building of new chapels, to

[a] *Hodgson* v. *Dillon*, ante.

[b] 1 & 2 Vict. c. 107, s. 16.

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be served by the curates appointed by the incumbent of the parish in which they were situate: and in other cases, as we have already observed, to create district chapelries; but power has been given to the commissioners subsequently to convert these last into separate parishes, with consent of the patron, ordinary, and incumbent, or, in case of the refusal of the incumbent, upon the next avoidance of the living.[c]

Repairs of.

The repairs of a chapel of ease are to be made in the same manner as the repairs of the church, by rates on the land, &c. within the chapelry, and are to be enforced by ecclesiastical authority; but if there be any land charged by prescription to such repairs, the land must be first resorted to, but it does not therefore follow that the land of the chapelry would not still be liable, if the land specially charged should be found insufficient.[d] The cases in which an ancient chapel of ease would be free from contribution to the repair of the mother church are hereafter spoken of. The new district chapels and churches are governed in this respect generally by the same law, but they remain subject to the repair of the original parish church for twenty years only after they are consecrated; after which the parish church is repaired by that portion only of the former parish which still remains attached to it. And the repair of the new chapels, to which no district is attached, are to be made by the parish, generally, in or for which they are built.[e]

Liability of chapelry to repair of mother church.

Rights of incumbent over them.

A bishop cannot consecrate a chapel of ease, or authorise a person to preach in it, without the consent of the incumbent: for the latter, as already observed, is the minister throughout his whole parish, and except in those cases where, under the provisions of some of the church building acts, it is expressly ordered otherwise, the incumbent would by the common law have the appointment of the minister of every chapel within his parish, whether ancient or newly erected.

The officers of a chapel of ease have, in most cases, the same ecclesiastical duties within their chapelry, as those of the parish church within the parish.

[c] 3 Geo. 4, c. 72, s. 16.
[d] Gibs. 209; Degge, pt. 1, c. 12.
[e] 58 Geo. 3, c. 45, ss. 70, 71.

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CHAPTER III.

OF SEATS AND PEWS IN CHURCHES.

SECTION 1.

In old Parish Churches.

Before the Reformation.

BEFORE the time of the Reformation no seats were allowed in churches, nor any distinct apartment in the church assigned to distinct inhabitants, except for some very great persons; the seats that were, were movable, and the property of the incumbent, and so in all respects at his disposal: and many wills of incumbents are to be seen, whereby they did of old bequeath the seats in their church to their successors, or others, as they thought fit. Athon and Lindwood are silent in the case. The common law books mention but two or three cases before this time, and those relating to the chancels, and to the seats of persons of great quality. But it does not follow that the distinct apartments here spoken of were pews in the body of the church; but aisles or private chapels may very probably be intended. It is only natural to suppose that the person by whom the church was first founded may have reserved some particular part of it to the use of himself, and the successive owners of his domains; and although it is now the received opinion that a seat in the nave of a church may be prescribed for as belonging to a house, yet it was formerly much doubted, and in fact denied; and overruled with regard to the right of the ordinary and the jurisdiction of spiritual authority.[a]

Present state of the law.

But the state of the law, as at present settled, with respect to pews in churches, is very clear and satisfactory; for, as is said by Lord Coke, as the church is a place dedicated and consecrated to the service of God, and is common to all the inhabitants, it therefore belongs to the bishop to order it in such manner as the service of God may best be celebrated, and that there be no contention in the church.[b] *Primâ facie*, therefore, in the absence of any prescription by custom, or of any faculty clearly established, which would be exceptions to the general rule, and also with the exception as to the chief seat

Right of disposing of all seats and pews is in the ordinary and churchwardens.

[a] Gibs. 221.

[b] 12 Rep. 105.

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in the chancel (which custom appropriates to the rector, whether lay or ecclesiastical, and sometimes to the vicar), the bishop, as ordinary of the diocese, or in practice the churchwardens, as the parochial officers of the ordinary for this and similar purposes, have the sole right of disposing, ordering, and arranging all seats and pews in the body of the church; and, as it seems now to be the better opinion, in the chancel also. And as the churchwardens exercise this power as the officers of the ordinary, it seems to follow that there could be no such thing as a custom in a parish for the churchwardens to make distribution of seats independently of the ordinary; although this appears to have been doubted.[c] For the right, however long it might have been exercised, could not have been adverse to the ordinary; but, on the contrary, would be presumed to have been exercised by him through his officers, or with his permission and concurrence; so that, as was said by North, C. J., the churchwardens cannot in this matter jostle out the authority of the ordinary.[d]

It being established that the parishioners have the right to the use of the church, and that the churchwardens, as the officers of the ordinary, are to regulate and arrange that use, it remains to be seen in what manner the parishioners, or any particular parishioner, might compel the churchwardens to make such arrangements in their favour, and what remedy the parishioners, for whom the churchwardens neglected to provide a seat, would have against them; and this would seem to be the same whether a parishioner had been removed from a seat by the churchwardens, or whether no seat had been provided for him.

Proceeding by parishioners to obtain seats from the churchwardens.

The case of *Walter* v. *Gunner and Drury* was a proceeding against the churchwardens of Teddington, calling on them to show cause why they had not seated or caused to be seated the plaintiff and his family in the parish church, according to his situation and condition, he being a principal inhabitant and parishioner, and having duly applied to them to be so seated. An appearance was given for the churchwardens, under protest, admitting the averment set forth in the citation, that he is a principal inhabitant, and that he had applied to them, at the same time alleging, that this was not sufficient in law to entitle Mr. Walter to cite them in this form; and further, that the church was so small, and the number of inhabitants so much increased, that many persons were obliged to submit to considerable inconvenience: some in sitting with others, some in having no seats; that many seats were held by

[c] Gibs. Cod. 226.

[d] *May* v. *Gilbert*, 2 Bulst. R. 151.

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custom, attached to houses in such a manner, that though the owners did not use them, they were occupied by their tenants; that the churchwardens have not interfered with such customary possession; that the house which Mr. Walter occupies was built by a Jew, who never applied for a seat; that in 1796, Mr. Walter applied for a seat, and a vestry was called, at which it was determined that persons should have permission to erect pews in a gallery on payment of five pounds to the parish; that this offer had not been accepted; that the plaintiff had refused to pay the church rate unless he was seated; that it was then proposed that a vacant place should be enclosed; and notice was given to him that a vestry would be held for that purpose, but he did not attend; that the churchwardens are desirous of accommodating all persons as well as they can without disturbing the possession of others; that they had no right to dispossess them; but were ready to submit to any order which the court might make upon them.

On the other side it was alleged, that, by law and usage, all pews, except those held by faculty or other legal title, ought to be distributed amongst actual parishioners; that many of the largest were assigned to persons not living or having lands in the parish; that others were annexed to houses, and let out by the owners to persons not living in the parish; that it was in the power of the churchwardens, by a legal exercise of their authority, to seat the complainant; that his house was one of the largest in the parish; and though he had applied in 1796, and the following years, nothing effectual had been done. It was replied, that the pew held by Seton is reputed to be annexed to the house of Mr. Retford, and that part of his family used to sit there; and the other, occupied by Lady Murray, was annexed to another house, called Comb House, which was now a school; and that the pew being too small for the boys, they were allowed to occupy seats in the gallery at a certain rent; that the churchwardens did not consider themselves to be authorised, by virtue of their office, to disturb the possession of these parties.

The most convenient mode of proceeding.

Sir W. Scott said, "I think the process has issued very properly in this case, *and that this is a convenient mode of proceeding, by citing the churchwardens, in a civil suit, to show cause, &c., as in this citation.* I do not think that it was necessary to allege that any particular pew was vacant, as it would be a sufficient return, on the part of the churchwardens, to aver, that they were unable to comply with the request, on account that there were no such vacancies. If that return was made and duly established, I fear it might be entitled to much consideration; as in the enlarged

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population of parishes in the vicinity of this town, it may really not be in the power of the churchwardens to make immediate additions to the fabric, or to build chapels at once for the accommodation of the inhabitants. The return, in this case, is not of that kind. It consisted of two parts; that notice was given of a vestry, and that an offer was made that the party might erect a pew, on a condition which is not strictly legal, that he should pay the parish for it. It is clearly the law on this subject, that a parishioner has a right to a seat in the church, without such payment; but I think the return is bad on another ground, for although it might be sufficient if there was no pew vacant, yet if there are existing pews improperly occupied, the mere offer of a permission to erect a pew is not a good return.

"The other part of the return is bad also, since it pleads a custom which is evidently illegal, and cannot be supported; that pews are appurtenant to certain houses, and are let by the owners to persons who are not inhabitants of the parish. All private rights in pews must be held under a faculty, or by prescription, which presumes a faculty, and no faculty was ever granted to that effect; for the ordinary must have exercised his discretion, to depopulate the church of its own proper inhabitants, if he could have granted such a faculty. The plea goes on to state that the churchwardens have not ventured to disturb such occupiers; to which it is answered justly, that they have not done their duty, for they ought to have prevented an occupancy of that kind.

Private rights in pews must be held under faculty or prescription.

"There is something stated also of a custom, that others, who have not pews appurtenant, pay a rent for seats, which is applied in easement of the parish rate; a practice which has been constantly reprehended by the ecclesiastical courts, and discouraged as often as it has been set up. Then the return is, I think, sufficient, and the party has shown that there are pews occupied by persons not living in the parish, and that a particular individual has obtained a large portion of the church, and let his own pew to a non-resident person. There is one pew appurtenant to the house of Mr. Retford, who does not live in the parish, and who covenants with his tenant that he shall not occupy it, in order that he may let it out to others. *This is clearly illegal.* If a pew is rightly appurtenant, the occupancy of it must pass with the house; and the individuals cannot, by contract between themselves, defeat the general right of the parish. It appears that the house has been built only eighty years, which is not sufficient to establish a

Sub-letting pews illegal.

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prescriptive right; because it might be presumed that evidence of the grant of a faculty was not extinct in that time; but even if there was a prescriptive right, it could not be exercised by transferring it to persons not inhabitants of the house or of the parish. Such possession cannot be maintained. There is also another instance in which the parish has given way to the partial convenience of one person, who holds a house to which a pew may be appurtenant. When, however, he was indulged with a gallery, the parish ought to have required him to exchange his own pew for that accommodation. He ought to be required to go back to his own proper pew, or give it up to the parish, as it is now used in the same improper manner by inhabitants of another parish.

"The court, therefore, is bound to overrule the protest, but I shall not do more, or give any costs against the churchwardens; for they have been acting under the general sense of the parish, and it is difficult for such persons to bear up against it. It is possible that the parties whose rights are asserted may have something more to allege in defence of them, and they must not be precluded. But I shall overrule the protest, giving such parties an opportunity to intervene."[t]

We have given a somewhat long report of the above case, because it appears to give an excellent practical view of the law, and also of what is right and most desirable to be practically done in such a case, and because, in the words of Sir W. Scott, it appears to be a convenient mode of proceeding, in a case where a parishioner is unable to obtain from the churchwardens a seat in his parish church, for it appears that the return could not be good and sufficient, unless it showed the state of the church to be such as would render it impossible to give any sitting to the plaintiff.

Or where they have been removed by the churchwardens.

The same mode of proceeding might be adopted by a party whom the churchwardens had removed from his seat, and seated there another party; but in such a case, although the court should decide that the churchwardens had acted properly in displacing the plaintiff, yet they will not go beyond this, so as to confirm the possession of the person whom the churchwardens have placed in the pew, as that might be injurious, by taking the pew more out of the control of the churchwardens.[u]

Vestry have no authority.

The vestry have no authority on the subject of ordering or arranging of pews, for they are not the representatives of the ordinary, and have no delegated authority from him;

[t] *Walter* v. *Gunner and Drury*, 1 Hagg. Cons. 317. [u] 1 Hagg. 40.

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nor are the churchwardens bound to follow their directions, although the opinion of the vestry should of course be treated with respect, and is entitled to its due weight;[x] and even as to the exceptions to the general rule before mentioned, a faculty is not a denial of the jurisdiction of the ordinary; but it is thereby supposed that some preceding ordinary has granted away from himself and his successors all control over a particular pew, and has thus estopped himself and them from intermeddling with it during the continuance of such faculty.[y]

Exceptions to the general right of the ordinary.

The general rule therefore being thus sufficiently established, it remains for us only to consider the exceptions already alluded to.

What is necessary to prove private right.

In order to exclude the jurisdiction of the ordinary from the disposal of a pew, it must be shown that the possession is ancient, and going beyond memory. But proof of ancient possession only will be insufficient; for it must generally, and except in such a case as we shall presently mention, be also shown that it has been repaired time out of mind by the predecessors of the party claiming it;[z] and the merely repairing it for thirty or forty years will not be sufficient.[a] But if ancient possession, and repair time out of mind, can be shown conjointly, then these will be sufficient to show a faculty, or a prescription which will presume a faculty; since it does not appear possible that such a prescription could have any other legal commencement than by grant of a faculty.

A case in the year 1783[b] was supposed to have shaken the law as to the necessity of proving ancient possession in all cases; for in that case the plaintiff, having proved that he had been put into possession of the pew thirty-six years before by the rector and churchwardens, was held entitled to it by the jury before whom the case was tried; and the motion made for a new trial, on the ground that this was no evidence, was refused by the Court of K. B. But upon looking to the judgment of Lord Mansfield upon the motion for the new trial, it will be found to confirm altogether the law as to immemorial right. "The plaintiff," he says, "in support of his claim, proves that he was put into possession of this pew thirty-six years ago. The question is, whether this act of the rector and churchwardens was to give possession *under an old immemorial right*, or in consequence of a new gift. There are strong reasons to

[x] See next chapter, On Ornaments of the Church; 2 Add. 425.
[y] See Sir W. Scott's judgment in *Walter* v. *Gunner and Drury*.
[z] *Stock* v. *Booth*, 1 T. R. 430. [a] 1 Hagg. 323.
[b] *Rogers* v. *Brooks and Wife*, cited 1 T. R. 431.

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induce us to suppose that it was not a gift: a gift cannot be made without a faculty, and there is none in this case. Moreover, in this case the pew was not claimed as against the ordinary, but as against another party in the parish.

In many cases the proof as to repairing will be negative only; for it may be that the pew has never wanted repairs: so that if immemorial right could be shown, it would be sufficient to show that neither the parish nor any other party had ever repaired the pew.[c]

By a recent statute[d] the time for claiming any easement by prescription is shortened; and an actual enjoyment for twenty years, without interruption, is made equivalent to enjoyment from time immemorial. But such a claim may still be defeated in any other way in which the same is now liable to be defeated. And after an enjoyment for forty years the right is declared to be absolute, unless it can be shown that it was enjoyed by some consent expressly given for that purpose by deed or writing. As no decision has taken place on the subject, it cannot here be determined whether this statute will apply to the case of pews;[e] but if it does, it will be seen that the claim by twenty years' possession may still be defeated by showing repairs to have been done by other parties.

It is also said that as there may be an exclusive right to a particular pew, so there may be an exclusive right to a seat in a particular pew, which will exclude the jurisdiction of the ordinary; and even a priority of a seat in a particular pew may be prescribed for;[f] if the latter fact were so, it would indeed of necessity establish the truth of the former. In the case of *Carleton* v. *Hulton*,[g] Carleton claimed the upper place in a seat; Hulton disturbed him. The Archbishop of York sent an inhibition to Carleton till the matter should be determined before him; but prescription was surmised, and thereupon prohibition obtained, because as well priority of seat as the seat itself might be claimed by prescription. It must be observed, however, that this case is not any direct authority on the point, although the only one that can be found. It is difficult to conceive in what legal manner such a prescription could have its origin; and it is certain that that which is considered the best evidence in the case of private pews, namely, that they have immemorially been repaired

Whether priority of seat can be prescribed for.

[c] For the law on this subject generally, see *Mainwaring* v. *Giles*, 5 B. & A., and cases there cited; *Morgan* v. *Curtis*, 3 Man. & Ry. 389.

[d] 2 & 3 Will. 4, c. 71.

[e] See Martin's Conveyancing, by Davidson, vol. iii., p. 274, n.

[f] 2 Add. 428; 3 M. & R. 334.

[g] Noy, 78; Palm. 424; Gibs. Cod. 222.

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by the owners, would be inapplicable to establish the right to any particular sitting, or to the priority of sitting in any particular pew.

Private right always annexed to house.

The exclusive right to any particular pew is always annexed to some particular house; for no man can have an individual property in a pew, transmissible to his assigns or to his heirs or executors. There is no such thing as a right to a pew in the body of the church in gross or at large; but it is a right which can only be held as appurtenant to some particular house; and it can be enjoyed and exercised by a person only so long as he resides in such particular house;[h] and it seems therefore that to whomsoever the house might be granted or transferred, to him also would be transferred the right to the pew; and since it is thus inseparably annexed to inhabitancy, it could not be prescribed for in respect of an estate within the parish on which there was no mansion.[i]

Right may be divided.

The right to sit in a particular pew, when once it has been created by a faculty, or presumed faculty, may be apportioned: thus, where a faculty was granted to a man and his family, owner and occupier of the dwelling-house, and the house was afterwards divided, the occupier of a part of the site of the dwelling-house, though a small part, has some right, and such as will enable him to maintain an action against the churchwardens for disturbing him in the enjoyment of it. And it was said by Littledale, J.:[k] "The plaintiff having a right to use the pew, the churchwardens had no right to interfere as they did, and were wrong-doers. It may certainly happen, in consequence of a house having been subdivided, that three or four families may become entitled to use a pew belonging to the original messuage; and they may require more accommodation, and a question may arise, how many persons are entitled to use the pew in respect of each of their subdivisions; that is, however, a matter to be settled among the respective owners. The right to enjoy the pew was annexed to the old dwelling-house altogether; the plaintiff lives in a part of that house; he therefore has some right to enjoy the pew, and may maintain an action in respect of it.

Seats in public aisles.

In these remarks, as we have said, we have been speaking only of seats and pews in the nave or body of the church; but if the aisles are public aisles, as is frequently and indeed commonly the case, they are then to be consi-

[h] 5 B. & A. 360. [i] 1 Phill. 325.
[k] *Harris* v. *Drew*, 2 B. & Ad. 167.

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dered, to all intents and purposes, as a part of the body of the church.

Remedies for disturbance of an alleged private right.

We have now seen in what manner there may exist a right to a seat or pew in the body of the church, paramount to the jurisdiction of the ordinary or churchwardens; and it follows, from the establishment of this right, that the person enjoying it may have his action at common law as well against the ordinary or churchwardens as against any stranger who should disturb him in the enjoyment of it: and this should be an action on the case, for an action of trespass will not lie for entering into a pew, because the plaintiff cannot have exclusive possession, that being in the parson.[l] And the usual and the legal mode of stating that the right of sitting in a particular pew has been annexed to a house by a faculty in the declaration, is, "That the plaintiff was possessed of a certain messuage, and that by reason thereof he ought to have for himself and family, inhabiting the said messuage, the use and benefit of a certain pew."[m] And this form, it is said, would be equally proper whether the action were against the ordinary or churchwarden, or against a stranger.

This however can scarcely be considered as satisfactorily settled; and it appears that, in an action against the ordinary or churchwardens for disturbance, it would be the safer plan to allege reparation. In an old case of *Kenrick* v. *Taylor*,[n] on a special action upon the case against the defendant for disturbing the plaintiff in his pew, which he claims by prescription, as appurtenant to his messuage in the parish, the declaration sets forth that the plaintiff, and all those whose estate he hath in the said messuage, have, time out of mind, repaired the pew: a verdict was given for the plaintiff, subject to the opinion of the court upon a case which stated that at the trial there was no evidence given that the plaintiff, or any of the owners of the messuage, had ever repaired or been obliged to repair the pew, or that the pew had ever wanted repairing. The question was, whether the plaintiff can maintain this action without proving repairs done to the pew. It was argued for the plaintiff that this being an action by one in possession against a mere stranger and wrong-doer, there was no necessity to prove any repairs; and that there was a great difference between an action against a stranger, and a contest with the ordinary in prohibition; for at common law the ordinary has the disposal of all the seats in the church; and although they be built and repaired at the expense of the

[l] 5 B. & A. 356; 1 T. R. 430; see *Spooner* v. *Brewster*, 3 Bing. 136.
[m] Rogers's E. L. 176; 1 T. R. 430. [n] 1 Wils. 326.

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whole parish, yet that will not oust him of his jurisdiction, and therefore a special title must be proved against them by building or repairing the seat; but possession alone is sufficient against a mere stranger. And of this opinion was the court, who said that this being a possessory action against a stranger and a mere wrong-doer, the plaintiff was not obliged to prove any repairs done by himself or others whose estate he hath; for it is a rule in law that one in possession need not to show any title or consideration for such possession. But it is otherwise where one claims a pew or an aisle against the ordinary, who undoubtedly hath *primâ facie* the disposal of all the seats in the church, and against him a title or consideration must be shown in the declaration and proved: and although the soundness of the distinction in this case may have been questioned by later cases, yet those cases are also doubtful; and in a late case for perturbation of seat in the Ecclesiastical Court, Sir J. Nicholl appeared to think that in the Ecclesiastical Court it was absolutely necessary to allege reparations from time to time in setting up a prescriptive title.[o]

But a party whose right or presumed right to a particular pew or sitting has been invaded, is not obliged to proceed in the courts of common law, for he also has his remedy in the Ecclesiastical Courts, and this, as it appears, in several forms,[p] and even where a prescription is claimed; although, properly speaking, the Ecclesiastical Court could have no jurisdiction in such a case, yet the defendant, if he pleases, may admit the prescription to be tried there, as a defendant does a modus or a pension by prescription.[q]

Perturbation of seat. Perturbation of seat, as it is called, is a proceeding of this kind in the ecclesiastical courts, and is a remedy given to a party whenever he has been disturbed in the possession or enjoyment of his pew, whether the disturbance proceed from a churchwarden or a mere stranger.[r]

Section 2.

Seats and Pews in Churches built under the Church Building Acts.

In the last section the law has been treated of with regard to the arrangement and distribution, the right of

[o] 3 Add. 6. [p] *Byerly* v. *Windus*, 3 B. & C. 1.
[q] *Cross* v. *Salter*, 3 T. R. 639. [r] Rogers's E. L.

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New churches or chapels.

property in, and the selling and letting of pews in all the old parish churches built prior to the year 1818. But, with regard to the churches built subsequently to that time, in pursuance of the different acts of parliament from time to time passed for that purpose, new principles have been introduced, and the law upon all these points is for the most part governed by the statutes under which these churches may have been erected.

Seat for minister.

Prior to the consecration of any church or chapel built subsequent to the above date, under provisions of the act[s] passed in that year, a seat or pew sufficient to hold six persons at least shall be set apart in the body or ground floor of the church or chapel, near the pulpit, for the use of the minister and his family; and other seats, not among the free seats, for not less than four persons, for the minister's servants.

Free seats.

Pews, sittings or benches in every such church or chapel, marked with the words "*free seats*," amounting to not less than one-fifth of the whole sittings in every such church or chapel which shall be built wholly or in part out of any rates, or with money raised on the credit of any rates, shall be appropriated for the use of poor persons resorting thereto for ever; upon which pews or sittings no rent shall be charged.[t] Though not less than one-fifth of the whole sittings are to be free seats, there is no restriction as to any larger proportion which, under the circumstances of each particular case, it may be thought expedient to appropriate for free sittings.

Pews to be let.

The latter part of this section is in affirmance of the old principle, by which all seats in the church are free; and the first part seems a sort of substitution for the rights of the minister in the chancel of the old churches. Proper pews are also to be assigned and provided for the use of the church and chapel wardens.[u] But the other pews or sittings are to be let at a rate to be fixed upon by the commissioners who, under the provisions of the same statute, are to be appointed to examine into the state of the parishes in England and Wales, and to ascertain the most effectual means of church accommodation.

Choice of.

The letting is to be to the subscribers (being parishioners) to any such church or chapel, who, at the rates thus fixed, are to have choice of the pews; the priority of choice being given to subscribers in order, according to the amount of their subscription, and where the subscriptions are equal in amount, then according to the order of their subscription.

[s] Chap. 45. [t] Sect. 75. [u] See 59 Geo. 3, c. 134.

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Parties entitled to free pews.

And if the amount of any subscription should be deemed sufficiently large, whether given for the purpose of purchasing a site for or building a church or chapel,[x] the commissioners are empowered to receive it in lieu of the pew rent which such subscriber would otherwise pay; who may thereupon be discharged, either wholly or in part, and either for a limited time or for life, according to the amount subscribed, from payment of his pew rent; and in such case, if the subscriber should afterwards remove from the parish, he would be allowed, at the discretion of the commissioners, to assign the remainder of the term in the pew so granted to him to any other parishioner inhabiting the parish.[y]

Rights to pews may be assigned.

And the commissioners are also empowered to transfer any such rights to pews, with the consent of the owners of them, which have been thus acquired, to the church or chapel of the division in which such persons shall reside (go to reside?), so that free seats may be made instead thereof in the churches or chapels from which such rights shall have been transferred; and the persons whose rights shall have been thus transferred shall have the same rights (but in no case any more extensive rights in the pews so assigned to them) as they had in their former pews, and this without the necessity of any faculty or other process. In these cases every such assignment is to be registered in the registry of the diocese, and a duplicate to be deposited in the church or chapel in which such pews shall have been so assigned.[z] And if any lessee of any pew or seat for a longer term than one year shall cease to be an inhabitant of any such parish or district (not having availed himself of any of the provisions before mentioned), or if he shall not have attended at such church or chapel for one year, his lease shall determine at the end of the then current year.[a]

Old principle of inhabitancy preserved.

It will be observed how much care has been taken in these statutes, even where a right to a pew has been acquired, to retain the ancient principle, and to confine the use of their church exclusively to the inhabitants of the parish; and in the original granting of such rights it is expressly provided, that the church or chapel wardens of any such church or chapel shall not let or sell any seats or pews except to parishioners during their continuing inhabitants of the parish.[b]

Sale of pews not to be by public auction.

Every sale of any pew or seat shall be subject to the reserved rent fixed by virtue of these acts, except in the case of such a discharge as we have already mentioned;

[x] 1 & 2 Will. 4, c. 38, s. 21. [y] 58 Geo. 3, c. 45, s. 33.
[z] 3 Geo. 4, c. 72, s. 23. [a] Ibid. s. 24. [b] 59 Geo. 3, c. 134, s. 31.

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and the sale shall be by private contract, and not by public auction.[c]

Proceeds of sale or letting.

The amount of rents and payments for the seats or pews, when received, is to form a fund, according to the order of the commissioners, out of which provision is to be made for the minister and clerk.[d]

Amount of rent.

In every such church or chapel the pews or seats (except those set down as free seats and the seats appropriated to the minister and his servants) are to be charged with the yearly rents set opposite the figures or numbers marked upon them in a list or schedule to be made and signed by the commissioners, and annexed to the deed of consecration; which are to be paid by the occupiers of the pews or seats to the persons appointed by the churchwardens, by two payments, on the Monday after the 25th December, and on the 24th June, in the vestry room, between nine in the morning and four in the afternoon. But the churchwardens, with the consent in writing of the incumbent, patron and bishop, may alter any such pew rents; and a new list or schedule of rents, and of the pews on which they are charged, shall in such case be signed by the churchwardens, incumbent, patron and bishop, and deposited with the deed of consecration.[e]

Recovery of rents.

If the rent of any seat or pew shall be unpaid for three months, and notice in writing demanding payment thereof shall have been given to the owner or occupier, the churchwardens may either enter upon and hold such seat or pew, or let the same to any other person till the rent in arrear and all costs shall be paid; or otherwise sell the same seats or pews by auction to the best bidder, and out of the money thence arising pay the rent in arrear, with the costs, rendering the overplus to the owner; or the churchwardens may recover the rent in arrear by action for use and occupation against the owners or occupiers.[f]

Payments to be made in advance.

Subsequently, however, it was directed that all pew rents should be payable in advance; that is, one year's rent shall be paid on the admission to the pew or seat if given at Lady-day or Michaelmas, and a half-year's rent above such proportion; and thereafter half-yearly payments shall be made in advance, commencing on Lady-day or Michaelmas following the taking; and every such pew or seat shall be forfeited and become vacant by discontinuing any such payment in advance for two following half years.[g]

Generally, therefore, the previous provision for recovery of pew rents would be rendered inoperative, but that pro-

[c] Sect. 32. [d] 58 Geo. 3, c. 45, s. 63. [e] Sects. 77, 78.
[f] 58 Geo. 3, c. 45, s. 79. [g] 59 Geo. 3, c. 134, s. 32.

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vision is not expressly repealed; and if the pre-payment had been for any time omitted, and the forfeiture consequent thereon had not been enforced, it seems that the provision of the first statute might usefully and conveniently be had recourse to for the purpose of recovering the arrears of rent.

Notice of vacant pews.

In every case in which pew rents are fixed according to the provisions before mentioned, notice is to be given for six successive weeks at the end of each year of all the pews vacant at the commencement of the next year, by writing affixed on the doors of the church or chapel and vestry room; and all pews not taken at the rents fixed, within fourteen days after the commencement of the ensuing year, shall be let to any inhabitant of an adjoining parish or place, in the churches or chapels of which there shall not be sufficient accommodation for the inhabitants thereof, at the rent fixed upon such pews, for any term not exceeding the end of the year, when such pews shall be again let in manner aforesaid, and so from year to year.[h]

When pews may be let to persons not inhabitants.

This power of letting pews in particular cases to the inhabitants of adjoining parishes is also given as to churches and chapels built under the 1 & 2 Will. IV. c. 38, by which it is enacted, that the pews and sittings in such churches and chapels shall be let by the churchwardens or chapelwardens, or by some person appointed by the trustees, or person or persons building and endowing the same, to act in that behalf, according to a scale of pew-rents fixed by the trustees, or such person or persons as aforesaid, and approved of by the bishop; which scale it shall be lawful for the trustees, &c. with consent of the bishop, to alter from time to time as occasion may require, provided that all such pews as shall not be taken at the rent respectively fixed thereon, within fourteen days after the commencement of the ensuing year, shall be let to non-parishioners in the same manner, and for such time only, as last mentioned.

Application of money from pew rents.

The amount of pew rents thus received is to form a fund, out of which is to be paid the stipend to the minister and clerk, but the parish is not to be answerable to them for any greater amount of stipend than may be actually received from pew rents; and any surplus, after paying such stipend, is to be invested in government securities in the names of trustees, and accumulated, first, for the purpose of building or purchasing a house of residence for the minister; and second, for augmenting his stipend, reducing the pew rents, or for increasing the accommodation in the

[h] 3 Geo. 4, c. 72, s. 24.

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church, as the bishop may direct: or if the commissioners think it expedient, the surplus may be applied towards payment of any money borrowed at interest by annuity or otherwise for building any church or chapel, or purchasing for it any site, and defraying all expenses relative thereto, and in repairing such church or chapel, or in aid of the church rate, if the commissioners shall so think fit; and the church or chapelwardens, with consent of the commissioners, may borrow at interest, by annuity or otherwise, any money for building such church or chapel, or purchasing such site, or defraying the expenses relative thereto, upon the credit of such pew rents; and by writing under their hands may charge such pew rents, subject to such stipend and expenses as aforesaid, with payment of any such money with interest, or with annuities, as such church or chapel wardens shall think fit.

Further assignment may be made to incumbent.

And after such an assignment of a certain stipend out of the pew rents has been made, the commissioners may at any time, with the consent of the bishop of the diocese, make a further assignment to the minister out of the pew rents, or out of the accumulating fund already received for pew rents, which further assignment is to be registered in the registry of the diocese. But this is not to be done in any case where such surplus pew rents have been invested in government securities in the names of trustees, for the purpose of forming a fund for the building or purchasing a house of residence for the minister; or where such surplus pew rents have been charged by the commissioners with the payment of any sums of money borrowed for the building any church or chapel, or for the purchasing any site for same, and defraying all expenses relative thereto, and in keeping such church or chapel in repair.[1]

Pew rents where parish church is changed.

In cases where, under the church building acts, a district church or chapel has been made the parish church, and the parish church has been made the district church or chapel, the church building commissioners, with consent of the bishop of the diocese, may make provision, under their common seal, for the maintenance of the minister and clerk of the respective churches out of the pew rents of either of such churches; but the rights of persons holding faculty seats or free seats in the old parish church are to be respected.

In churches built and endowed under the provisions of the Church Endowment Act, by the authority of the eccle-

[1] 3 & 4 Vict. c. 60, s. 5.

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siastical commissioners, there appears to be no provision of any kind as to pew rents. Such churches will therefore, it is presumed, be exactly on the same footing as the ancient parish churches in this respect, and any letting of pews therein will be unlawful.

CHAPTER IV.

OF THE GOODS, UTENSILS, AND ORNAMENTS OF CHURCHES.

HAVING considered generally the right to the use of the church by the parishioners, and the law relating to the fixtures which have been placed there for their better accommodation, we come now to speak of the goods and ornaments which are necessary for the decent celebration of divine service, and for the better instruction of the people resorting thereto.

To be provided at the charge of the parish.

It seems that, from time immemorial, all such goods were to be provided at the charge of the parish;[a] and previous to the Reformation these were much more numerous than at present; a list of which we subjoin, as, although now obsolete, it exhibits a curious illustration of the form of worship and the ceremonial of those days.

A legend.
An antiphon.
A grail.
A psalter.
A troper.
An ordinal.
A missal.
A manual,
The principal vestment, with a chasuble.
A dalmatic.
A tunic.
A choral cope and all its appendages.
A frontal for the great altar.
Three towels.
Three surplices.
One rochet.

[a] See directions in canons 20, 58, 70, 80, 82, 99, &c.

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A cross for processions.
A cross for the dead.
A censer.
A lanthorn.
A handbell to be carried before the body of Christ in the visitation of the sick.
A pix for the body of Christ.
A decent veil for Lent.
Banners for the rogations.
A vessel for the blessed water.
An osculatory.
A candlestick for the taper at Easter.
A font with a lock and key.
The images in the church.
The chief image in the chancel, that is, the saint to whom the church is dedicated, and the images in the glass windows.[b]

There are many of these terms which would require a longer explanation than would be consistent with the object of this work in speaking of things obsolete. It will be obvious, however, that the things here enumerated were not applicable to the reformed religion; an alteration consequently took place, and the goods and ornaments of the church were settled by authority of parliament in the year 1548, the second year of the reign of Edward VI. This settlement having been disturbed in the reign of Mary, was confirmed immediately upon the accession of Elizabeth; and by the second act passed in her reign,[c] it is enacted that such ornaments of the church and of the minister thereof shall be retained and used as were in the Church of England, by authority of parliament, in the second year of the reign of King Edward VI., until other order shall be therein taken by the authority of the queen's majesty, with the advice of her commissioners appointed and authorised under the great seal of England for causes ecclesiastical, or of the metropolitan of this realm. Pursuant to this last clause the queen, in the third year of her reign, granted a commission to the archbishop and three others to reform the disorders of the chancels, and to add to the ornaments of them by ordering the Commandments to be placed at the east end. These disorders were such as had been introduced during the reign of Mary, all which were probably reformed by the commissioners; and by the rubric before the book of Common Prayer, such ornaments of the church and of the ministers thereof, at all times of their ministration, shall be retained and be in

Ornaments of the church, &c. when finally settled.

[b] Burn's Eccl. Law, "Church." [c] 1 Eliz. c. 2.

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use as were in this Church of England, by authority of parliament, in the second year of the reign of King Edward the Sixth.

Necessary goods and ornaments.

Such goods and ornaments are the following, all which it appears are deemed necessary for the service of the church, and which the parishioners, at their own charge, are therefore bound to provide.[d]

Communion table.

A convenient and decent table for the celebration of the Holy Communion, to be kept and repaired from time to time in a decent and seemly manner, and covered in time of divine service with a carpet of silk or other decent stuff, thought meet by the ordinary of the place, and with a fair linen cloth at the time of the ministration, as becometh that table, and so stand, saving when the said Holy Communion is to be administered. At such time the same shall be placed in so good sort within the church or chancel, as thereby the minister may be more conveniently heard of the communicants in his prayer and administration, and the communicants also more conveniently, and in more number, may communicate with the said minister.[e]

Pulpit.

A comely and decent pulpit, to be set up in a convenient place within the church, by the discretion of the ordinary, and to be there seemly kept for the preaching of God's word.[f]

Reading desk.

A convenient seat for the minister to read service in.[g]

Surplice.

A decent and comely surplice with sleeves, to be worn by every minister saying the public prayers, or administering the sacrament or other rites of the Church; and if any question arise touching the decency, matter or comeliness thereof, the same shall be decided by the discretion of the ordinary.[h]

Font.

A font of stone in every church and chapel where baptism is to be ministered, the same to be set in the usual places, in which only font the minister shall baptize publicly.[i]

Alms' chest.

A strong chest, with a hole in the upper part thereof, having three keys, of which one shall remain in the custody of the parson, vicar or curate, and the other two in the custody of the churchwardens for the time being; which chest they shall set and fasten in the most convenient place, to the intent that the parishioners may put into it their alms for their poorer neighbours, which alms and devotions of the people the keepers of the keys shall, yearly, quarterly or oftener as need requireth, take out of the chest and distribute the same in the presence of most

[d] See directions of the canons. [e] Canon 82. [f] Canon 83.
[g] Canon 82. [h] Canon 82. [i] Canon 81.

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of the parish, or six of the chief of them, to be truly and faithfully delivered to their most poor and needy neighbours.[k]

Alms' basin. A decent basin, in which the deacons, churchwardens or other fit persons, are to receive the alms for the poor, and other devotions of the people, whilst the sentences of the offertory are in reading.[l]

Chalice. The chalice, or cup for the wine, to be used at the Holy Communion, or more than one cup if necessary; which wine is to be brought to the communion table in a clean and sweet standing pot or stoop of pewter, if not of purer metal.[m]

Bell. A bell to ring to church, and to toll at funerals, with the ropes;[n] but no more than one bell appears to be necessary.

Bier. A bier for the dead.[o]

Bible. A Bible of the largest volume;[p] and though it may be matter of speculation as to what was originally intended by this, the discussion would now be useless.

Common Prayer. The Book of Common Prayer, and the book of homilies allowed by authority.

Register. A parchment book, wherein shall be written the day and year of every christening, wedding and burial within the parish; and for the safe keeping thereof, the churchwardens shall provide one sure coffer with three locks and keys, whereof one to remain with the minister, and the other two with the churchwardens severally.[q]

Proper books, of vellum or good and durable paper, in which all marriages and banns of marriage respectively there published or solemnized, shall be registered, to be carefully kept and preserved for public use.[r]

And this obligation on the parish to provide a suitable register book, does not appear to be at all affected by the act of 6 & 7 Will. IV. c. 86, which provides for the establishment of "The General Register Office" in London or Westminster.[s]

Table of degrees of marriage. A table of degrees of marriage prohibited, which is to be publicly set up in every church.[t]

The Ten Commandments. The Ten Commandments, which are to be set up upon the east end of every church or chapel, where the people may best see or read them.[u] But as it is very possible that in many churches they could not easily be read or seen by the people, if set up at the east end, it is pre-

[k] Canon 84. [l] Rubric. [m] Canon 20; Lind. 252.
[n] Lind. 250; 3 Hagg. 16. [o] Lind. 252. [p] Canon 80.
[q] Canon 70. [r] 26 Geo. 2, c. 33. [s] See post.
[t] Canon 99. [u] Canon 82.

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sumed that they may be, as they frequently are, set up elsewhere in the body of the church, where they may be more easily read.

Chosen sentences are also directed to be written upon the walls in convenient places, and these most frequently are the Lord's Prayer, the Apostles' Creed, &c.[x] Chosen sentences.

The above appear to be all the things which are held *absolutely necessary* for the administration of divine service in the church, and are all that the parish is absolutely enjoined to provide; and this originally, as will be observed from the authorities in the notes, was for the most part by the injunction of the canon law. But now by the statute law also; for the statutes mentioned above, and also the 13th of Charles II. c. 4, which declare that all such things shall be proper for the use of the church, as were so considered in the second year of Edward VI., are rendered permanent by the act of the 5th year of Q. Anne, c. 5, which act was in the following year incorporated into the Act of Union,[y] and which declares that all acts for the establishment and preservation of the Church of England, and the doctrine, worship, discipline and government thereof, shall remain and be in full force for ever.

With regard to these goods of the church, many of which are clearly necessary to the performing of divine service, and without which the fabric of the church might be in fact useless, the question might probably arise which will hereafter be discussed more fully when we come to speak of church rates: for the scruples of conscientious dissent which lead men to disregard the law, where the law can be evaded with comparative impunity, never seem to have been contemplated in the ordering of matters of this sort. If the parish should refuse to provide the surplice, the Bible or Book of Common Prayer, the minister would be prevented from performing, and certainly, it is presumed, could not be compelled to perform the service; and thus, it appears, that the majority of the rate payers might, as it were, place their parish under an interdict. Parish not providing necessary goods, &c.

Besides these necessary articles which have been above enumerated, and which the parishioners are bound to provide at their expense, there are many other articles for which no provision is made by any special law: such are galleries erected in the church, bells, other than that necessary to ring to church and to toll at funerals, as before mentioned, organs, clocks, chimes; the king's arms, which Goods, &c. which are not necessary.

[x] Canon 82. [y] 5 & 6 Anne, c. 5.

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are very commonly set up in churches, pulpit cloths, house cloths, rushes or mats, furniture for the vestry, or such like, and the salaries for the ringers or the organist.

When parish would be chargeable with repair of goods, &c. not necessary.

As to some of these things, if they have been originally set up with the consent of the parishioners, and under directions of the ordinary—or if an organist or ringers have been appointed in like manner—or if they are found to have existed from time out of mind, then it appears that the parish would be rightly chargeable with their repairs or their continuance. But if any new ornament were to be set up or added to the church, without the consent of the parish, it appears that they could not be chargeable for its repair or preservation. But very much appears to depend on the discretion of the ordinary, who will take into consideration the particular circumstances of the parish.[a]

Organs.

In cathedrals, for example, organs may be deemed necessary; and the ordinary may compel their erection by the dean and chapter. In parish churches it is otherwise; and in small or poor parishes it might be proper to discourage them.[a]

Unnecessary goods, &c. presented to a church.

But if such an ornament had been presented to a parish church, or purchased by a subscription, and the consent of the ordinary given for its erection, it seems that the consent or refusal of the parishioners to its erection would be immaterial, because neither the expense of erecting it or repairing it would in such a case fall upon them.[b] And with this agrees the judgment of Lord Stowell, in a case somewhat similar, who said, "The law respecting church ornaments is now generally understood and settled. The *consent of the parishioners is not indispensably necessary*, unless to charge the parish with any expense for support of the ornament, after it has been put up; but if there is no charge incurred, the approbation of the majority of the parishioners is not necessary, nor the disapprobation binding on the ordinary." And in that case Lord Stowell decreed a faculty for accepting and erecting an organ offered to the church, without a clause against future expenses being charged to the parish, which was rich and populous.[c] And here Lord Stowell carries out a rule, which he laid down in another case, where he says, the court is not bound by the wish of the majority, though it will pay great attention to it in granting a faculty. The court may refuse

[a] See the judgment of Sir W. Scott, case of Burton on Trent.
[a] See judgment of Sir W. Scott, 1 Hagg. Cons. 298; Rogers's E. L. 434.
[b] *Butterworth and Barker* v. *Walker and Waterhouse*, 3 Bur. 1689.
[c] *Churchwardens of St. John, Ramsgate*, v. *Parishioners and Vicar of same*, 1 Hagg. Cons. 298.

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the whole parish joined together; or may grant, if it appears necessary, a prayer on the application of one against all the rest.[d]

Salary of organist.

With regard to the salary of an organist in a church, where an organ already existed, it was held by Sir William Scott that it might be rightly paid by the churchwardens, and charged by them in their accounts, with consent and approbation of the vestry. And such being the case, it seems that the last-mentioned decision as to the acceptance of the organ, without the clause against future expenses, would in effect be the compelling certain parishioners, against their wish, to a subsequent annual expenditure. But the parishioners generally, that is, the majority in vestry, must be consenting, because the ordinary could only bind the parish to expenses for articles absolutely necessary; consequently, although he might refuse, in granting a faculty to accept and erect an organ, to insert a clause against future expenses being charged to the parish, he could not by the faculty positively direct the organist and the repairs of the organ to be paid out of the parish rates; for that would be legally objectionable on the ground last-mentioned,[e] and equally so, though the vestry wished it. Rails about the altar seem to stand on the same ground, as being ornaments not absolutely necessary.

Majority of parishioners may decide in some cases as to the necessity.

In a case, where the communion table of ancient time had been placed in the chancel, and there were ancient rails about it which were out of repair, the parishioners at a meeting had resolved to repair the chancel and rails, and to replace the table there, and raise the floor some steps higher, for the sake of greater decency. Upon a refusal to pay the rate, and a prohibition prayed, the court inclined that the parishioners might do these things, for they are compellable to put things in decent order; and as to the degrees of order and decency, there is no rule but as the parishioners, by a majority, do agree;[f] but these matters will be considered more particularly, when we come to speak of church rates.

General rule.

The general rule deducible from these cases is simple and easy of application. As to all things necessary, and which have been already enumerated, the parish must provide, continue and repair them. As to things not absolutely necessary, and such as are last mentioned, the parish need neither provide them in the first instance, nor continue and repair if they have been already provided, except by wish and consent of the majority. But if the majority have

[d] *Groves and Wright* v. *Rector of Hornsey*, 1 Hagg. Cons. 189.
[e] 3 Hagg. 7.
[f] *Newson* v. *Bawldry*, cited 1 Burn's E. L. 368.

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voted a rate for that purpose, and the purpose appear reasonable under the circumstances, it will be upheld and enforced against dissentients. The parishioners, therefore, have no reason to object to a faculty for erecting any thing of the latter kind, on the ground of future expense, because the majority will always have the remedy in their own hands on that point.

Monuments in the church.

Among the most frequent ornaments of our English churches at the present day are the monuments erected in them to the memory of the dead. And as to these it is said by Lord Coke, concerning the building or erecting of tombs, sepulchres or monuments for the deceased, in church, chancel, chapel or churchyard, in convenient manner, it is lawful; for it is the last work of charity that can be done for the deceased, who whilst he lived was a lively temple of the Holy Ghost, with a reverend regard and Christian hope of a joyful resurrection.[g]

Cannot be erected without consent of the ordinary.

This dictum, however, so far as it relates to our present purpose, the erection of monuments in church or chancel, must be taken to mean that it is lawful for certain persons, and under certain conditions only; for the ordinary is the sole and proper judge of what may be erected in the interior of the church; and in the setting up of monuments it is essential that his consent should be obtained.[h] And it was said by Lord Stowell,[i] "there can be no question as to this, that no monument can be erected without the leave of the ordinary. It is to his care that the fabric of the church has been committed; and it is not to be defaced at the caprice of individuals." It is also stated in the books that the consent of the parson is necessary to the erection of monuments in the church. This, however, must be considered as very doubtful; nor is it to be collected from any decision that if the ordinary were to grant permission to erect a monument in the church, the dissent of the incumbent would be material. In a case in the Court of King's Bench in 1803[k] the rector of a parish applied to that court for a prohibition to restrain the ordinary from granting a faculty to a party for erecting a monument in the church: the case was not decided on its merits, the application being held to be premature; but it was there said by Lord Ellenborough that the faculty sought to be obtained was no more than a license from the ordinary himself to do the act proposed, and would not bind the rector against his consent, *if by law his consent were material;* and *non constat*, that after his consent were obtained, the defendant

Consent of incumbent when and whether always necessary.

[g] 3 Inst. 102.
[h] 2 Cro. Eliz. 366.
[i] 1 Hagg. Cons. 207.
[k] *Bulwer* v. *Hase*, 3 East, 217.

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would make use of it, without obtaining the consent of the rector also.

In a subsequent case in 1818,[l] where the churchwardens of a parish in London had claimed a right to set up monuments, without consent of ordinary or parson, Lord Ellenborough, in giving judgment, said, "Assuming that the custom for churchwardens to set up monuments in the church, without the consent of the parson, might be good; it is at any rate too large a proposition to contend for that without the consent of the rector, or that of their common ecclesiastical superior, they may put up any thing, however unseemly." But the strongest dictum in favour of the right of the incumbent is that of Lord Stowell, in a case already mentioned.[m] "The court," he says, "would act improperly, if it was to say that parties might erect a monument without leave of the rector." But in this case, it appears from the report, that the monument was intended to be erected in the chancel; and it does not appear that the consent of the ordinary had been obtained.

Upon the whole, it appears, that if the ordinary should grant a license for the erecting any monument in the church, the incumbent would have no power to prevent this from being done. It is true that the freehold of the parson would be thus invaded; but for this the customary fees would be compensation; and this invasion of his freehold might in like manner be said to take place, if the ordinary should order any new erection to be made in the church, and a majority of the parishioners should agree to a rate for the expenses, in which case it seems clear that the rector could not hinder the erection. But it rather appears that usually the consent of the incumbent has been held to be essential, as representing the ordinary for this purpose; for practically, it is certain, that the consent of the ordinary to the erection of monuments is seldom obtained, and the consent of the rector is obtained instead; "for the ordinary usually reposes confidence in the minister to do what is proper,"[n] and the cases must be rare in which a faculty would be granted in opposition to the wishes of the incumbent. But nothing can legalise the erection of a monument without a faculty obtained for that purpose; so that the assent of the parson, though generally deemed sufficient, would be of no avail if the matter were contested.[o]

This power of the ordinary to give consent to the erection of monuments is to be exercised according to a prudent

Appeal to the archbishop.

[l] 1 B. & A. 508. [m] *Maidman* v. *Malpas*, 1 Hagg. Cons. 207.
[n] Lord Stowell, 1 Hagg. Cons. 207.
[o] 1 Hagg. Cons. 14, 208; 3 Add. 15; 1 Lee, 640.

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and legal discretion, which his metropolitan has a right to superintend and correct, who upon appeal may, if he see good reason, order them to be removed.[p]

It follows from what has been here said, that if monuments were to be erected without the consent of the ordinary, he has in such case sufficient authority to order them to be removed,[q] without any danger of an action at law. It is nowhere said, however, that the rector would be justified in so doing, which may be urged as a further reason against the necessity of his assent to their erection.

A safe course to be taken by the incumbent objecting.

The better course therefore to be adopted by the incumbent, if he objects to the setting up of any monument in his church, appears to be, to insist on nothing being done until the consent of the ordinary is obtained; and then to make such representation to the ordinary as to induce him to withhold such consent; or if a monument has been already erected, to which he objects, then to make application to the ordinary to cause it to be removed. Provided the objection were reasonable, there could be no doubt but that the object would be thus obtained; and no unpleasant consequences could result to the incumbent.

Repairing monuments.

When a monument has been once erected, it may be repaired and kept in proper order without any fresh consent of the ordinary or incumbent; it may be proper to apply to churchwardens for leave to do so, but this appears a mere formal act, for the churchwardens would have no power to refuse such consent.[r] And indeed it appears to be their duty to encourage the keeping of them in good repair; in which they are supposed to have such an interest, as to enable them to bring an action for defacing any monument:[s] an act which is in itself an ecclesiastical offence: and it is also an offence at common law, and those who build or erect the monument might equally with the churchwardens maintain an action against one who defaces them during their lives; and after their decease, the heir of him to whose memory the monument is set up could maintain such an action.[t] And this, as it seems, should be an action of trespass.[u]

Defacing.

[p] Str. 575, 1080; *Bulwer* v. *Hase*, ante.
[q] Gibs. 453.
[r] *Burdin* v. *Callcott*, 1 Hagg. 14.
[s] 3 Phill. 89.
[t] Co. Litt. 18 b; 3 Inst. 110; 2 Roll. Rep. 140.
[u] *Spooner* v. *Brewster*, 3 Bing. 136.

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CHAPTER V.

OF CHURCHYARDS.

"As to the origin of burying places, many writers have observed that, at the first erection of churches, no part of the adjacent ground was allotted for interment of the dead, but some place for this purpose was appointed at a farther distance, especially in cities and populous towns, where, agreeably to the old Roman law of the Twelve Tables, the place of inhumation was without the walls: first, indefinitely by the way-side, then in some peculiar enclosure assigned to that use. Hence the Augustine monastery was built without the walls of Canterbury (as Ethelbert and Augustine in both their charters intimate), that it might be a dormitory to them and their successors, the kings and archbishops, for ever. This practice of remoter burials continued to the age of Gregory the Great, when the monks and priests beginning to offer prayers for souls departed, procured leave, for their greater ease and profit, that a liberty of sepulture might be in churches, or in places adjoining to them. This mercenary reason seems to be acknowledged by Pope Gregory himself, whilst he allows that when the parties deceasing are not burdened with heavy sins, it may then be a benefit to them to be buried in churches; because their friends and relations, as often as they come to the sacred places, seeing their graves, may remember them, and pray to God for them. After this, Cuthbert, Archbishop of Canterbury, brought over from Rome this practice into England about the year 750; from which time they date the origin of churchyards in this island. The practice of burying within the churches did indeed (though more rarely) obtain before the use of churchyards, but was by authority restrained, when churchyards were frequent, and appropriated to that use. For among those canons which seem to have been made before Edward the Confessor, the ninth bears this title "*De non sepeliendo in ecclesiis,*" and begins with a confession that such a custom had prevailed, but must now be reformed, and no such liberty allowed for the future, unless the person be a priest, or some holy man, who by the merits of his past life might deserve such a peculiar favour.

Origin of burying places.

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However, at first, it was the nave or body of the church that was permitted to be a repository of the dead, and chiefly under arches by the sides of the walls. Lanfranc, Archbishop of Canterbury, seems to have been the first who brought up the practice of vaults in chancels, and under the very altars, when he had rebuilt the church of Canterbury about the year 1075."[a]

The passage here quoted seems to embody all that can be known, with certainty, as to the origin of churchyards. But although, as above-mentioned, they may have been introduced as early as A. D. 750, it is nearly certain that they did not become common until a much later period. For so late as the end of the fourteenth century, they were not recognized by the law, and at that time appear to have been considered as recent.

For by a statute about that time, stating that some religious persons, parsons, vicars, and other spiritual persons, have entered in divers lands and tenements, which be adjoining their churches, and of the same, by sufferance and assent of the tenants, have made churchyards; and, by rules of the Bishop of Rome, have hallowed and dedicated the same, and in them continually do make parochial burying; the practice is declared to be in contravention of the Statute of Mortmain.[b] It does not appear, however, that this statute produced any particular effect in putting a stop to the practice; and, notwithstanding the declared illegality of their origin, churchyards have now been repeatedly recognized by the common law, by the canon law, and by statute.

Churchyards legalised.

Consecration of.

Churchyards, already in existence, are presumed to have been properly consecrated. But when any new churchyard is made, or any addition made to one already existing, a ceremony of consecration takes place; the bishop, clergy and parishioners repairing to the ground which is to be consecrated, and a prayer suited to the occasion being used; and when new churches are consecrated, the churchyards annexed to them are usually consecrated immediately after the consecration of the church.

Privileges of, formerly.

The cemetery has the same privileges as the church, and, therefore, before sanctuary was abolished by statute 21 Jac. I. c. 28, the churchyards, equally with the churches, had the privilege of sanctuary; a short account of which we subjoin, as it serves to show the high degree of sanctity attached to things ecclesiastical in former days; for, abjuration was, when any person had committed felony, and

[a] Kennett's Par. Ant. 592, 593.
[b] 15 Rich. 2, c. 5; and see 7 Edw. 1, st. 2.

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for safeguard of his life had fled to the sanctuary of a church or churchyard, and there, before the coroner of that place within forty days had confessed the felony, and took an oath for his perpetual banishment out of the realm into a foreign country, choosing rather to lose his country than his life; but the foreign country into which he was to be exiled might not be among infidels. Whoever was not capable of this sanctuary, could not have the benefit of abjuration; and therefore he that committed sacrilege, because he could not have the privilege of sanctuary, could not abjure. The privilege lasted for forty days, during which time any person might supply him with meat and drink for his sustentation, but not after, on pain of being guilty of felony. And the law was so favourable for the preservation of sanctuary, that if the felon had been in prison for the felony, and before attainder or conviction had escaped and taken sanctuary in the church or churchyard, and the gaolers or others had pursued him, and brought him again back to prison, upon his arraignment, he might have pleaded the same, and should have been restored again to the sanctuary.[c]

Freehold of, is in the minister.

The freehold of the churchyard is, to a qualified extent, in the minister; and this, it is said, whether he be rector or vicar,[d] the correctness of which dictum however is very doubtful, as will presently appear. The soil and profits belong to him, and he might make a lease thereof; which profits appear to be the feed and trees growing in the churchyard, or, in fact, any crop which it may bear; but even as to these the right of the minister is considerably qualified, and, with respect to the trees in a churchyard, the right of the minister over them was long since limited by the statute, or declaratory treatise, supposed to have been made in the reign of Edward I., but the certain date of which is unknown. "Because we do understand that controversies do ofttimes grow between parsons of churches and their parishioners, touching trees growing in the churchyard, both of them pretending that they do belong unto themselves, we have thought it good rather to decide this controversy by writing than by statute, forasmuch as a churchyard that is dedicated is the soil of a church, and whatsoever is planted belongeth to the soil, it must needs follow, that those trees which be growing in the churchyard are to be reckoned amongst the goods of the church; the which laymen have no authority to dispose; but, as the Holy Scripture doth testify, the charge of them is committed

Trees in.

[c] 3 Ins. 115, 117; Horne's Mirror of Justice, Book 1.
[d] Comyn's Dig. Cemetery (A. 2.)

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only to the priests to be disposed. And yet, seeing those trees be often planted to defend the force of the wind from hurting the church, we do prohibit the parsons of the church that they do not presume to fell them down unadvisedly, but when the chancel of the church doth want necessary reparation. Neither shall they be converted to any other use, except the body of the church doth want like repair; in which case the parsons, of their charity, shall do well to relieve the parishioners, with bestowing upon them the same trees, which we will not command to be done, but will commend when it is done."[e]

For what purpose they may be felled.

This statute or declaration was sufficiently clear as to the purposes for which such trees might be cut down; but these purposes seem considerably extended by a decision of Lord Chancellor Hardwicke; for in a case before his lordship in 1741, the patron of a living prayed an injunction against the rector to stay waste in cutting down timber in the churchyard; and the Lord Chancellor there says, that "a rector may cut down timber for the repairs of the parsonage house, or the chancel, but not for any common purpose. If it be the custom of the country, he may cut down underwood for any purpose; but if he grubs it up, it is waste. He may cut down timber likewise for repairing any old pews that belong to the rectory, and he is also entitled to botes for repairing barns and outhouses belonging to the parsonage." And the injunction was granted to stay the rector from cutting down timber except in the particular instances before mentioned.[f] And it seems to follow from the above case, that such trees also might be cut down for the purpose not only of repairing, but of building a parsonage house.

In a very recent case, an injunction was applied for in chancery to restrain parties who, under an ancient grant from the crown in the time of Hen. VIII., were governors of the goods, &c. of a parish church, from cutting down and grubbing up trees in a churchyard. The defendants, by their answer, set up the ancient grant to them as their right; and that for two hundred years their predecessors had always exercised the right of removing such trees as showed symptoms of decay, and of planting young ones in their place; and that the trees in question were cut down in order to prevent them from injuring the church. The Vice-Chancellor Shadwell refused to grant the injunction, saying, that the statute *Ne rector prosternet, &c.* did not apply to such a case; that the defendants appeared to have exercised the right for two hundred years; and that

[e] 25 Edw. 1, st. 2.

[f] *Strachey* v. *Francis*, 2 Atk. 217.

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there was nothing to show an improper exercise of the discretion of a right which, *primâ facie*, they clearly possessed.[g]

The decision of Lord Hardwicke has an important influence on the case of doubt alluded to above, where there is a rector and a vicar in the same church, as to which of them the trees in the churchyard are to belong. Lindwood says,[h] this may be doubted, but adds, I suppose that in such a case they belong to the rector, unless in the endowment of the vicarage they shall be otherwise assigned. In a very old case the controversy arose; and the vicar sued the parson impropriate for cutting them down. It does not appear that the main point was ever there decided, but Lord Chief Justice Rolle has intimated a very reasonable opinion, and one agreeable to what is said in the statute before mentioned, viz. that they belong to him who is bound to repair, and that the parson shall not cut them down but when the chancel wants reparation.[i] But if the reasoning upon which Chief Justice Rolle proceeds be applied to the law as laid down by Lord Hardwicke, it is evident that the law is still unsettled; for, as the lay rector might be bound to repair the chancel, and the vicar to repair the parsonage house, to either of which purposes the trees may, according to Lord Hardwicke, be applied, each might urge in favour of his claim the opinion of Chief Justice Rolle; nor can it be safely said to whom in such a case they would belong.

Where rector and vicar are different persons.

As the parishioners have a right to the use of the church to hear divine service, so have they to that of the churchyard for the burial of their dead; and, consequently, the general care of repairing it, when necessary, belongs to the churchwardens, in like manner as that of the fabric of the church, at the charge of the parish; and they are the sole judges of what is needful to be done therein, as being invested with the authority of the ordinary for that purpose; for the power of the ordinary extends undoubtedly over the churchyard as well as over the church, so as to exercise a general control over the right of the parishioners as well as of the minister.[k] And therefore, although the feed growing in the churchyard belongs of right to the minister, yet it is presumed that he can only take or use it in such manner as may be no nuisance to the parishioners; and that if he were to turn horses or cattle there to graze, by which the graves might be trampled or defaced, or the tombstones or trees be injured, the ordinary might most properly inter-

Right of parishioners to use of churchyard.

Restricts the right of minister.

[g] *Attorney-General* v. *Warren*, Nov. 8, 1844, coram V. C. of England.
[h] Lyndw. 267. [i] 2 Roll. Abr. 337. [k] Prid. 41; [l] Ventr. 367.

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fere to order their removal: as in the case of unseemly monuments erected within the church; or the minister might be libelled in the Ecclesiastical Court at the suit of the churchwardens for nuisance in the churchyard. And so if the minister should remove or cause to be removed any monuments or tombstones in the churchyard, the churchwardens should proceed against him in like manner for a nuisance;[l] or the wife or executors of the deceased who set them up, or the heir of the deceased in such case, might have their action against the minister, or indeed against the churchwardens themselves, and much more against a stranger.[m]

Fences and rails.

If the churchyard be not decently enclosed, the church, which is God's house, cannot decently be kept. The churchwardens therefore are to take care that the churchyards be well and conveniently repaired, fenced and maintained, with walls, rails, &c. as have been in each place accustomed, at their charge, unto whom the same appertaineth. This, in the absence of any custom to the contrary, is at the charge of the parish;[n] but if the owners of lands adjoining the churchyard have used time out of mind to repair so much of the fence thereof as adjoineth to their ground, such custom is a good custom, and the churchwardens are the proper parties to have an action against them for neglecting to do so;[o] but this being a custom to charge a temporal inheritance, the remedy against them must be by action at common law; and if the churchwardens were to sue them in the Ecclesiastical Court, a prohibition would lie; or they might, it seems, indict the party who ought to repair, and neglects so to do, for a misdemeanor. Thus the vicar of the parish of —— was indicted for non-repair of the fences of the churchyard; which, it was alleged, he had been immemorially bound to repair; by means of which swine and other cattle broke in, and rooted up the gravestones, and dirtied the porch, &c., to the nuisance of the inhabitants of the parish; and though the verdict was found for the defendant, it never seems to have been suggested but that the indictment was right in form, and the mode of proceeding proper.[p] And so in any case where any encroachment is alleged to have been on the churchyard, the churchwardens should bring an action against the supposed wrongdoer in the common law courts; for the proper boundary of the churchyard would come in question, which is matter of freehold, and could not be triable in the Ecclesiastical Court; for though the church-

Repairs of.

Boundary of, triable in common law courts.

[l] 3 Phill. 90.
[m] Com. Dig. Cemetery C.
[n] 2 Ins. 489.
[o] 2 Roll. Abr. 287.
[p] *R. v. Reynell*, 6 East, 315.

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yard, being consecrated ground, is under the jurisdiction of the Ecclesiastical Court, and it is the duty of that court to protect it against any unauthorised or improper invasion, yet if any doubt should be suggested, whether the ground in question be consecrated, and whether it is the property of the church, or of another party, the Ecclesiastical Court would have no further jurisdiction; and for the same reason, where a parson had libelled a defendant in the Spiritual Court for having cut elms in the churchyard, a prohibition was granted upon a suggestion by the defendant that the elms grew on his freehold.[q]

Encroachments on the churchyard.

It must be remembered, however, that what is here said applies only to the case where the boundary of the churchyard is actually the question at issue; for the churchwardens are bound to take notice in the Ecclesiastical Court of encroachments on the churchyard. Thus, where a prohibition was prayed on behalf of a churchwarden, to the Ecclesiastical Court, for that they tendered him an oath upon these articles following, first, whether any person within this parish hath encroached upon the churchyard, it was said that it concerned matter of freehold; but this was overruled by the Court of King's Bench; and it was held that the churchwardens may take notice in the Ecclesiastical Court of encroachments upon the churchyard. And so in the following case.[r]

In a prohibition, the case was, that Newton, one of the churchwardens, libelled against Quilter, for stopping the church door and window by sheds, &c., built, as he supposed, upon part of the churchyard. It was moved for a prohibition upon a suggestion that the sheds were not built upon part of the churchyard, but were built upon a lay fee, and that cognizance of lay fees appertains to the temporal courts. *Sed per curiam*, a prohibition shall not be granted to any suit in the Spiritual Court for any nuisance or other matter done in the churchyard, upon a suggestion that the churchyard is a lay fee, for a nuisance there is properly of ecclesiastical cognizance. This latter case might at first sight appear to contradict what is said above as to the case where the Ecclesiastical Court could no longer have jurisdiction; but it will be seen that, although it was there suggested, that the sheds were built on a lay fee, it does not appear to have been alleged that that fee was the defendant's, so that the court was not deciding a question of right, or even claim; and in the absence of any party claiming as against the church, the court had *primâ facie* jurisdiction.

[q] Ld. Raym. 212.

[r] *Quilter* v. *Newton*, Carth. 150.

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Monuments and tombstones.

That which we before said[s] as to the right of the rector to oppose the erection of monuments in the church, after a faculty obtained from the ordinary, and as to the respective rights of the rector and the ordinary in such cases, would, it is conceived, be equally applicable to the case of monuments or tombstones in the churchyard. Unfortunately, in a recent case[t] in which the question came to be directly decided, whether a party might erect a tombstone without the consent of the incumbent, the point was held to have been not sufficiently put in issue by the terms of the citation; and the court gave no intimation of its opinion. It rather appears however that, as was said before in the case of the erection of monuments in the church, the incumbent practically may be considered as representing the ordinary for this purpose, "the ordinary reposing confidence in him to do what is proper;" but that it is in this manner only that the consent of the incumbent can be considered as absolutely necessary; and that, in strictness of law, it is the ordinary whose consent is essential, and that he might give or withhold his consent without reference to the consent of the incumbent. Or it may perhaps be said, further, (though practically it would be the same thing,) that the incumbent has the power of consent or dissent as against every one except the ordinary, but it must be remembered that the exact point has not been directly decided.

Whether consent of incumbent is necessary before their erection.

In a recent case, before Sir H. Jenner, that learned judge appears to have regarded the incumbent rather as the proper party to proceed against a person putting up an objectionable monument, than as having in himself a right to order its removal: for speaking of the promoter of the suit he says, "The clergyman of the parish is the proper person to proceed in such a case, for to the incumbent belongs the general superintendence of the church and churchyard; and it is his duty to take care that no monument should be placed there which could be the means of disseminating doctrines inconsistent with the established religion."[u] There can be no question, therefore, but that the clergyman has a direct interest in this matter, and a direct duty to perform: the only doubt can be as to the extent of his power in the performance of it.

In the same case it was decided, that an inscription on a tombstone which exhorts to prayers for the dead, as, for instance, "Pray for the soul of J.W.," is not an inscription contrary to the doctrines of the Church of England, as

[s] See last chapter.
[t] *Breeks* v. *Woolfry*, 1 Curt. 880.
[u] Same case.

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contained in our articles: and that a party is not liable to be proceeded against in a criminal suit for erecting or refusing to remove such a stone. It must be observed, however, that it does not follow from this decision but that the ordinary, or the incumbent acting for him, might have caused the stone to be removed without any danger of an action.

The possession and right of property in tombstones erected in a churchyard, like the monuments in the church, belong to those who erected them; and if any one defaces or injures them, the owners may have an action against the wrongdoer. But, if the incumbent, in exercise of his general discretion and authority over the whole freehold of the church, injures them, or causes them to be removed, it seems that no remedy lies against him, unless the erection was made under the sanction of a faculty. And it would be the same in the case of a vault: for unless a faculty has been obtained, the incumbent, in exercise of his general discretion, might cause a vault to be opened for the interment of other persons than those for whom it was designed, and whose relatives have been there buried: and this, as it seems, although the incumbent should himself have permitted the vault to have been made for the exclusive use of the party claiming it; for the incumbent could have had no power to give such permission, and his giving it would therefore have been a nullity.[a]

Churchwardens to protect churchyard against the minister.

The churchwardens, as we have already seen, are the proper parties to bring actions for preserving the integrity of the churchyard, and this not only as against strangers, but even as against the minister himself; of so qualified and limited a nature are the rights of the latter in his freehold.

The Rev. K. M. T., vicar of Floore, in Northamptonshire, claimed a right of way from the vicarage house to the parish church; and, in assertion of that right, he began to pull down a part of the churchyard wall, in which, as he asserted, a gateway had formerly existed. One of the churchwardens prayed for and obtained an injunction from the vice-chancellor, to prevent him. In a trial at law, which was had soon afterwards, between T. and the tenant of the lands, over which he claimed his right of way, the verdict was given against such alleged right; and the case then came to a hearing before the vice-chancellor, who said that he would make the injunction perpetual, were it not that Mr. T. wished again to try the action in a varied form. The injunction however was con-

[a] See *Bryan* v. *Whistler*, 8 B. & C. 288.

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tinued until the trial. In the course of the argument in this case, it was suggested by counsel, that churchwardens might be the owners of the goods, but that they had no interest in the freehold of the church; and therefore that they could not maintain an action in respect of the realty. But it was said by the vice-chancellor, "suppose the churchwardens are liable at law to keep the walls of the churchyard in repair, would it not follow that they might bring an action on the case against any one who injured the walls? And as the churchwardens can institute a suit in the ecclesiastical courts for a nuisance, or other matter done in the churchyard, there seems no reason whatever why this court should not interfere to prevent the commission of the very nuisance, in respect of which they might have a suit. For the Ecclesiastical Court could not issue an injunction, and, therefore, although it may punish an injury to the freehold of the church, after it has been done, it has no power to prevent its being done."[x]

By injunction.

Churchway.

Repair of.

If the churchway, as is frequently the case, be a highway, that is, if it be common to all the subjects of the realm, and not merely to the parishioners, the charge of repairing it of common right lies on the occupiers of lands within the parish; though it may be cast on certain persons, by reason of inclosure, tenure, or prescription; and, in some cases, it is to be regulated by surveyors appointed under the stat. 13 Geo. III. c. 78.

But if the churchway should lead only to the church, terminating at the churchyard, and common only to the inhabitants of a particular house, hamlet, village, or parish; then, as it is a churchway, and to a certain extent only a private way, the right to it may be claimed and maintained in the Ecclesiastical Court; so that he who ought to repair it, would be compelled by that court to do so; but if it were suggested that it was a highway, then a prohibition would be granted, for such a question would be triable only at common law. But in either case it does not appear that the remedy by indictment would be improper; and if in the indictment it was alleged to be a footway to the church of A., without stating more particularly whether it was a highway or not, it would be held good:[y] and there would probably be few cases in which in practice it would not be the better and safer course to proceed by indictment, leaving the defendant to raise the objection as to proper jurisdiction, if he should think fit.

Indictment for non-repair.

Provisions for additional churchyards.

The recent statutes for the erection of additional churches

[x] *Marriott* v. *Tarpley*, 9 Sim. 279.

[y] 1 Vent. 208; 2 Raym. 1175; 3 Bac. Abr. 493; Ayl. Parer. 438.

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have provided, that all such parishes or extra-parochial places, as shall be required by the commissioners, shall furnish lands for enlarging existing, or for making additional churchyards or burial grounds, as the commissioners shall deem necessary: and the commissioners shall give notice to the churchwardens, to be left at their abodes, of the intention to enlarge the existing, or to set out new burial grounds; and of the extent of ground required for such purpose, and for a proper approach thereto, and of the place in which the same is required to be provided; and the churchwardens shall, within fourteen days, call a meeting of the vestry, or persons possessing the powers of vestry, for taking all necessary measures for providing the same; and in case the parish or place cannot provide the same, without purchase, the vestry, or persons possessing the powers of vestry, are required forthwith to proceed to treat for ground, according to such notice, but shall not conclude any bargain without the commissioners' approbation.[a] The commissioners may accept, from persons willing to give, any lands not exceeding in quantity what may be sufficient for building a church or chapel, and providing a churchyard.[a]

Powers for grant or purchase of lands for such purpose.

All the powers and provisions of these acts which relate to the grant, sale, conveyance, purchase, and resale of lands, to or by the commissioners, for the purpose of building any additional churches or chapels, or the advancing, raising, or taking up at interest, money for any such purpose, shall extend to grants, &c. of lands or hereditaments necessary for enlarging or making any churchyard or burial ground, and approaches thereto, and for issuing money required for those purposes, repaying by instalments or otherwise.[b] Lands thus added to any existing churchyard or burial ground, or appropriated for a new burial ground, shall, as soon as convenient, be consecrated for the burial of the dead; and shall for ever be used as an additional burying ground; and the freehold of the land so consecrated, shall thereupon vest in the person or persons in whom the freehold of the ancient burial ground of such parish or chapelry shall from time to time be vested.[c]

Power to alter boundaries, &c. of churchyard.

The commissioners may, if they think fit, alter, repair, pull down, and rebuild, or order or direct to be altered, &c. the walls or fences of any existing churchyard or burial ground of any parish or chapelry, and fence off any additional or new burial ground, to be provided under the

[a] 59 Geo. 3, c. 134, s. 36.
[b] 59 Geo. 3, c. 134, s. 37.
[a] 58 Geo. 3, c. 45, s. 33.
[c] Sect. 38.

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above powers; and also stop up and discontinue, or alter, or order to be stopped up, &c. any entrance to any churchyard or burial ground, and the footways and passages over the same, as they shall think fit; provided the same be done with the consent of two justices of the peace, and on notice being given.[d]

Power for enlarging churchyards.

The commissioners may authorise any parish, chapelry, township, or extra-parochial place desirous of procuring or adding to any burial ground, to purchase any lands the commissioners may think sufficient, and properly situate for that purpose, and to make rates for the purchase thereof, or for repaying with interest any money borrowed for making such purchase; and the churchwardens, or persons authorised to make rates, shall exercise all powers for making such purchases, and making and raising such rates; and when any lands so purchased shall be situate out of the parish or place for which it was intended, the same shall, after consecration, be deemed part of such parish or place.[e]

In cases of the churchyards to churches built under the provisions of 1 & 2 Will. IV. c. 38, it is directed, that when five years have elapsed after the land has been conveyed for that purpose, it shall vest absolutely in the persons to whom it has been so conveyed; provided that if it should be recovered in ejectment, the value found by the jury, and the costs, shall be tendered within two months after the judgment.[f]

[d] Sect. 39. And as to the notice, see 55 Geo. 3, c. 68.
[e] 3 Geo. 4, c. 72, s. 26. [f] Sect. 17.

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BOOK IV.

OF THE PROVISION MADE BY LAW FOR THE SUPPORT OF THINGS ECCLESIASTICAL.

CHAPTER I.

CHURCH RATES.

Origin of the rate.

By the authority of all writers on the general canon law, the repairs of the whole of the parish church, both of the body and the chancel, fall upon the rectors or owners of the tithes; except that, by custom in some countries, part falls upon the parishioners. But by the common custom of this country, the repairs of the nave of the church, in which the lay parishioners sit, fall upon the parishioners themselves; the repair of the chancel only falling upon the rector;[a] or, as Lyndwood expresses it, by custom, the burthen of reparation, at least of the nave of the church, is transferred upon the parishioners.[b] At what period the transferring of this burthen from the tithes to the parishioners may have taken place, cannot now be ascertained. As early as the time of Canute, the obligation is thus declared: "*Ad refectionem ecclesiæ, debet omnis populus, secundum rectum, subvenire.*"[c] And in those parts of the rest of Europe where the custom in this respect is similar to that of England, such custom appears also to have been very ancient, though the authorities which are referred to in support of that belief, are not sufficiently clear to be quite satisfactory;[d] and a case, found in the

Its antiquity.

[a] Van Espen, Jus Eccles. Univers. part 2, sect. 2, tit. 1.

[b] De reparandis Ecclesiis, Lyndw. p. 53, note; Tindal, C. J., in *Veley* v. *Burder*, 12 Ad. & Ell. 301.

[c] Thorpe's Ancient Laws and Institutes of England. vol. i. p. 410; vol. ii. p. 540.

[d] See Lindenbrogius, Cod. Leg. Ant. 688; Baluzii Capit. Reg. Fran. vol. i. 530; Canciani Barb. Leg. Ant. i. 219.

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Year-Book, 44 Edw. III. f. 18, whilst it establishes the fact, that the burthen of repairing the nave of the church had been transferred from the tithe, and that church rates were made by the parishioners so early as the year 1370, does at the same time, by a plea therein contained, of "a custom from time immemorial, within the particular parish, to levy the amount of the rate on each parishioner, by distress," necessarily carry back, beyond the time of legal memory, the obligation of the parishioners to make a rate upon themselves for the reparation of the parish church.[e] The same is laid down by Holt, C. J., who says, by the civil and the canon law, the parson is obliged to repair the whole church, and is so in all Christian kingdoms but in England;[f] for it is by the peculiar law of this nation, that the parishioners are charged with the repairs of the body of the church.[g]

The exact origin of church rates, therefore, like that of a great portion of our common law, is lost in the obscurity of antiquity. But probably there are very few of our institutions more ancient. There is no question but that the assessment of them is of far higher antiquity than that of those other kinds of rates which are now commonly imposed for various secular purposes; and that the custom for parishioners to make a rate upon themselves, for the reparation of their parish church, existing beyond the time of legal memory, and extending over the whole realm, is no other than the common law of England.[h]

Objects of the rate.

The purposes for which a church rate may be levied, are in most instances determined by custom or common law; but there are other purposes to which they are made applicable by statute.

At common law.

By common law, the purpose may be twofold: 1st, the necessary and essential repairing of the fabric of the church; and, 2nd, the repairing of the ornaments of the church, and of the things appertaining thereto, and the providing all things essential to the performance of divine service therein.

Former distinction between the objects of the rate at common law.

And formerly, there was a much greater distinction between these two purposes, which may be called necessary and unnecessary repairs, than at present, the subject of the rate in either case being different; for whereas, in the latter case, the rate was to be limited to inhabitants only, in the former case non-inhabitants also were to be charged. Thus it has been said formerly, that if a person, who is not an inhabitant within the parish, but has land there, is

[e] See argument of Sir W. Follett, in *Veley* v. *Burder*.
[f] Sed quære.
[g] *Hawkins* v. *Rous*, Carth. 360.
[h] Tindal, C. J., in *Veley* v. *Burder*, 12 Ad. & Ell. 302.

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rated there for the ornaments of the church, according to his land, a prohibition lieth, for the inhabitants ought to be rated for them; and Yelverton said that this had been divers times so resolved.[i]

And Gibson says, "a rate for the reparation of the fabric of the church is real, charging the land, and not the person; but a rate for ornaments is personal, upon the goods, and not upon the land. Thus it was defined and agreed in the Court of King's Bench, where the tax was for the reparation of the church, for church ornaments, and for sexton's wages; and because the person rated, though an occupier of land in the parish, dwelt out of it, he was declared to be unduly rated in the two last articles; and it was further agreed that, if a tax be made for the reparation of seats in a church, a foreigner shall not be taxed for that, because he hath no benefit by them in particular. The same distinction as to ornaments was again declared to be good. And long after these, in Woodward's case, in the 4 Jac. II. where the matter was a tax for the bells of the church, a prohibition was granted, upon this suggestion, that the party who prayed it was not an inhabitant of the parish; and the court gave for reason, because it is a personal charge, to which the inhabitants alone are liable, and not those who only occupy in that parish, and live in another.[k]

And there can be no doubt but that formerly this distinction was very clearly established and constantly acted upon. At present it is principally important in the bearing which it may have upon the question which will be afterwards discussed, whether the churchwardens alone, or they with a minority of the rate-payers, can make a rate which has been refused by the majority; for it was urged in argument by Sir W. Follett,[l] in the discussion of that question, that there might and did exist a power in such persons to make a rate for necessary repairs, although it might not exist to make a rate for ornaments, &c. To all practical purposes, however, no such distinction any longer exists.

No such distinction now exists.

A tax upon inhabitants as distinct from occupiers would raise a number of doubtful questions on the proper subject of the rate, as well as on the object to which it could properly be applied; and the question of Holt, C. J., appears unanswerable, when he asks, in a case before him, "If a man be an inhabitant as to the church, how can he not be an inhabitant as to the ornaments of the church?"[m]

[i] See 1 Burn's E. L. "Church Rates;" and Sir W. Follett's arguments in *Veley* v. *Burder*.

[k] See 1 Burn's E. L., ante. [l] *Veley* v. *Burder*, ante. [m] 1 Salk. 164.

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Has ceased long since.

Sir Simon Degge observes, there has been some question made, whether one that holds lands in one parish, and resides in another, may be charged to the ornaments of the parish where he doth not reside; and some opinions have been, that foreigners were only chargeable to the shell of the church, but not to bells, seats, or ornaments. But he says, he conceives the law to be clear otherwise, and that the foreigner that holds lands in the parish, is as much obliged to pay towards the bells, seats and ornaments, as to the repair of the church; otherwise there would be great confusion in making several levies, the one for the repair of the church, the other for the ornaments, which, he says, he never observed to be practised, within his knowledge. And it is possible that all, or the greatest part of the land in a parish, may be held by foreigners; and it were unreasonable, in such a case, to lay the whole charge upon the inhabitants, which may be but a poor shepherd.[n]

Inconvenience of the distinction.

And indeed the great inconvenience, if not the impossibility of making any such distinction practically, would be a sufficient argument against it, and would seem therefore to prevent the possibility of successfully relying on such a doctrine in the case to which it has been applied; for no distinction could be accurately drawn between repairs for the fabric of the church and for ornaments: the steeple itself might be termed an ornament: and, as said by Holt, C. J.,[o] the bells are more than mere ornaments; for they are as necessary as the steeple, which is of no use without the bells: and it will be observed, that the terms "necessary" and "unnecessary" do not apply, respectively, to repairs of the fabric, and repairs, &c., of the goods and ornaments; for those things, which by the canon law are ordered to be provided by the parishioners, as the surplice, books, &c., must without doubt be considered necessary, although they have nothing to do with the fabric.

Legal objects of a church rate at common law at the present day.

It may be said, therefore, that the legitimate object of a church rate at common law is the maintaining and repairing of the body of the church, the belfry, and all common or public chapels within or adjoining to the church,[p] and also the defraying of all expenses connected with the service of the church, and that these purposes are equally the legitimate object of the rate; which is no less applicable to the one purpose than to the other. But a church rate, one of the objects of which was the providing for the minister's salary, was held invalid.[q] And it may be here

[n] 1 Burn's E. L. 379.
[o] Same case, 1 Salk.
[p] Degge, 202.
[q] 2 Curt. 902.

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observed, that a church rate, greater in amount than is necessary for the particular object for which it is imposed, is so far illegal that it is at any rate a good objection to the rate in a suit for subtraction; as where an estimate was produced which a sixpenny rate was sufficient to cover, and a nine-penny rate was made nevertheless: and in that case it was said that the legality of a church rate was its necessity.[r]

Object of the rate by statute law.

There are other purposes to which, by virtue of different statutes, the church rate has been made applicable.

Enlarging and extending the accommodation of churches.

Thus, a power has been given to churchwardens, with the consent of the vestry or persons possessing the powers of vestry, and of the bishop and incumbent, to borrow and raise on the credit of the rates such sums as shall be necessary for defraying the expense, or any part of it, of enlarging or otherwise extending the accommodation in the then existing churches; and to make rates for the payment of the interest of the sums borrowed; and for providing a fund of not less than the amount of the interest upon the sum advanced, for the repayment of the principal thereof, or for repaying such principal in such manner and at such times, and in such proportions, as shall be agreed on with the person advancing the money: provided one half of the additional accommodation be allotted to uninclosed or free seats.[s]

Repairing churches by sums borrowed.

This last provision is for enlarging or otherwise extending the accommodation in churches; but a power has also been given to churchwardens, where a church requires to be repaired, to borrow the requisite amount, in the same manner, upon the credit of the rates; but in that case the sum raised must be sufficient to pay, not only the interest of the sum borrowed, but also ten per cent. annually[t] of the principal sum borrowed, until the whole shall be repaid.[u]

Building new churches or chapels out of rate.

If an application to the commissioners, under the statutes last alluded to, shall have been agreed upon by the vestry and not dissented from by one-third in value of the proprietors within the parish, (such value to be ascertained by an average of the poor rate for three years of proprietors of houses, lands freehold and copyhold, by leases for years, of which fifteen years are unexpired or determinable on lives,) the commissioners may authorise the building, either wholly out of the rates, or partly out of the rates and partly by subscription, of a church or chapel; and such application having been made and assented to by the commis-

[r] *Smith* v. *Dickson*, 2 Curt. 264.
[s] 58 Geo. 3. c. 45, s. 59.
[t] *R.* v. *Churchwardens of Dursley*, post.
[u] 59 Geo. 3, c. 134, s. 14.

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sioners, the churchwardens may then, of their own authority,[x] raise the whole sum or the portion necessary, or they may borrow such sums on the credit of the rates; and, in case of borrowing, may make rates for the payments of the interest of the money advanced, and for the providing a fund, of not less than the amount of the interest upon the sum advanced, for repayment of the principal, in such manner and proportions, and at such times as shall be agreed on with the lender. Nor is any further consent of the parishioners necessary to the making such a rate; the churchwardens alone may make it: it is no matter of ecclesiastical cognizance, and the Court of Queen's Bench will enforce it by mandamus.[y] But this latter subject will again come under consideration, when we speak of the mode by which the payment of these rates may be enforced.

Such a rate may in some circumstances be without the consent of bishop or incumbent or commissioners.

In the above cases it will be observed that the consent of the bishop and incumbent, or an application to the commissioners and their sanction, is necessary before such rates as last mentioned can be legally imposed; but if the rate intended to be thus imposed for building and enlarging is under a certain amount, then it may be made without such consent or application and sanction. For the inhabitants of any parish assembled at a vestry, or the major part of them present at a vestry, of which notice shall have been given on two successive Sundays preceding such vestry, or two-thirds of the persons exercising the powers of vestry, assembled at a vestry of which due notice for the assembling of such persons shall have been given, may order and direct the making a rate, not exceeding one shilling in the pound, for one year, and five shillings in the pound in the whole, upon the annual value of property in the parish, for the purpose of building or enlarging any church or chapel, wholly or in part, by means of rates, without any further consent; but no such rate, larger in amount than the above, can be thus made or raised if one-third part in value of the rate payers (such value to be ascertained as mentioned above) shall dissent and signify their dissent in writing. If there is no such dissent, then such order of the inhabitants is imperative on the churchwardens, who are to raise, levy, collect and enforce payment of the rate accordingly.[z]

As where under a certain amount.

Where the repayment of sum borrowed is to be by instalments of a certain amount.

Another case in which a rate for these purposes may be made without such consent, application or sanction as above mentioned, is where the repayment of the sum bor-

[x] *R. v. St. Mary Lambeth*, 3 B. & Ad. 654.
[y] Ibid.; 58 Geo. 3, c. 45, s. 61. [z] 59 Geo. 3, c. 134, s. 25.

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rowed is agreed to be made more quickly and in much larger annual amounts than as before mentioned. Thus the churchwardens of any parish, or persons appointed to act as such in any extra parochial place, with the consent, in any parish, of the vestry or select vestry, or persons possessing under any act or acts of parliament the powers of vestry, and with the consent, in any extra-parochial place, of the majority of the persons who would be entitled to vote in vestry if the same had been a parish, assembled at any meeting called for that purpose, (of which notice must be given in the church or chapel of the extra-parochial place, or in the church or chapel nearest adjoining thereto,) may borrow any money upon the credit of the rates of the parish or extra-parochial place; and they are thereby empowered and *required*, in any case in which such money shall have been borrowed, to raise by rate a sum sufficient from time to time to pay the interest of the money so borrowed, and one-twentieth part annually[a] of the principal sum borrowed, out of the produce of such rates, until the whole of the money so borrowed shall be paid.[b]

It must be admitted that the above provisions of the 58 Geo. III. c. 45, and the 59 Geo. III. c. 134, as to raising money upon the rates, are not less complicated than the other provisions of the same two statutes. For our present purpose, however, viz. the legitimate object of a church rate under these statutes, the following summary, as containing the present state of the law, may be usefully added.

Church building rates without consent.

If the church building rate does not exceed one shilling in the pound for one year, and five shillings in the whole, upon the annual rateable value (notice of the vestry being given on two successive Sundays), it may be imposed by the vestry in the usual manner, and without any extraordinary consent. So money to any amount, as it seems, may be borrowed upon the security of the church rate without any extraordinary consent, provided the interest of the sum borrowed and one-twentieth of the principal be repaid annually out of the produce of the rates; which rate for repayment the churchwardens are empowered and required from time to time to raise and levy.

When consent is necessary.

But if a sum is to be borrowed on the credit of the church rates, and it is intended to repay the same in annual sums of less than 20*l.* per cent., besides the interest, then the bishop and incumbent must consent, or the commissioners must give their sanction to the arrangement; but the amount of principal, from time to time repaid, must never in these cases be less than 10*l.* per cent.

[a] *R. v. Churchwardens of Dursley*, post. [b] 58 Geo. 3, c. 45, ss. 57, 58.

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The object must be prospective.

It is essential to the proper legal object of a church rate, that such object should be prospective; that is to say, that no part of it should be applied in discharge of debts or expenses previously contracted; for it is right that the parishioners should know beforehand, at the time when the rate is imposed, for what purpose it is required, so as to be able to decide as to the propriety of the expenditure; and, as the parishioners are a fluctuating body, it would be unfair for persons coming into a parish to be burthened with the debts of their predecessors, over whose conduct and votes they had no control.

History of the law on this point.

It does not appear that a retrospective church rate was considered illegal formerly; for very many instances are to be found where such church rates have been imposed: and a decree in chancery has even been made on a bill filed by the executrix of a late churchwarden, against ninety parishioners, to be reimbursed what her testator had advanced in rebuilding the church steeple; the court saying that it was a proper case for relief, and that there were many precedents of a like nature.[c]

But so long back as the year 1702 it had been decided, that a retrospective poor rate was illegal;[d] and a mandamus applied for to compel churchwardens and overseers of the poor to make a rate to reimburse former overseers had been refused by Holt, C. J., and the doctrine there established had remained unshaken. When, at a much later period, the opposition to church rates became in many places systematic, and every mode was investigated by which they might be defeated, it seems to have, for the first time, occurred to the opponents that the doctrine which had formerly been established in the case of poor rates was equally applicable to church rates. Many arguments have been adduced to show the essential difference of the two cases; the poor rate being assessed by the overseers, the church rate by the parishioners themselves; and it being a principle of self-taxation, that the majority of those who tax themselves may apply the tax to such purposes as they may think proper: but it would be useless now to notice these arguments, as the doctrine of the illegality of a retrospective rate has been fully recognised, and is now clearly established by the ecclesiastical and common law courts.[e]

All retrospective church rates illegal.

It has been held, moreover, that there is no real dis-

[c] *Nicholson* v. *Masters*, Viner's Abr. Churchwardens.

[d] *Tawney's case*, 2 Ld. Raym. 1009.

[e] See especially *R.* v. *Churchwardens of Dursley*, post; and *Pigott* v. *Bearblock*, post.

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tinction between the case of a rate, on the face of it retrospective, and a rate not retrospective on the face of it, but intended to cover debts, or parts of a debt, previously incurred; but that the rate in either case is bad; and therefore, in the case of a church rate, not retrospective on the face of it, parties opposing it might enter into evidence to prove that it was made for, and intended to be applied to, retrospective purposes.[f] Nor will it aid the legality of a retrospective rate, that the majority of the parishioners, however large, have assented to it; for though a majority of the parishioners in vestry may bind the minority, it must be for a legal, not an illegal purpose.

Earlier cases as to.

The earlier cases on retrospective church rates decided on their illegality only so far, that the courts would not interpose to compel the making of such rates at the instance of the parties who were to be reimbursed by them. Thus, in the year 1810, Lord Ellenborough refused to grant a mandamus to the chapelwardens of a township within a parish, to compel them to make a rate to reimburse other churchwardens such sums as they had expended, and also refused to grant a mandamus to raise the money in the common form of such a rate prospectively, out of which the churchwardens might repay themselves.[g] And so in another case in the Court of Chancery, the vice-chancellor dismissed a bill with costs, which had been filed to obtain a decree for a rate to be made to reimburse a former churchwarden monies laid out whilst in office.[h]

Present state of the law.

But now it has been fully decided, that the majority of the parishioners themselves cannot make such a rate, and, in fact, that such a rate is bad in itself, and that nothing can make it good.

In a suit for subtraction of church rate,[i] the libel showed a rate, which was upon the face of it, and in form, prospective. But the defensive allegation in answer pleaded the fact, that it was intended out of it to reimburse the churchwardens for sums previously expended. The question of the admissibility of this allegation was very fully argued; and Dr. Lushington, in the Consistory Court, decided that evidence in support of such a fact ought not to be excluded. He says, "if a small portion only of the rate was intended to cover such expenses, I should not be inclined to pronounce against it;[k] on the other hand, if the rate be retrospective to a very considerable extent, I

[f] Same cases. [g] *R. v. Chapelwardens of Haworth*, 17 East, 556.
[h] *Lanchester v. Thompson*, 5 Madd. 4. [i] *Chesterton v. Farlar*, 1 Cur. 345.
[k] But see post, Lord Brougham in *Pigott v. Bearblock*.

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am of opinion that the numerous decisions which have taken place in other courts, pronouncing retrospective rates illegal, would necessarily lead me, under the circumstances stated, to refuse to enforce such a rate."

In a subsequent stage of this same case, it was admitted that the rate was retrospective to the amount of a third of the whole amount; and, in deciding against its validity, Dr. Lushington says, "had the sums in the present case been of small amount, I should have felt myself justified in leaving them entirely out of consideration."

Upon appeal from this decision to the Court of Arches, it was overruled by Sir Herbert Jenner, but from his decision, a further appeal was prosecuted to the Judicial Committee of the Privy Council, by which the judgment of Sir H. Jenner was reversed, and the decision of Dr. Lushington, as to the illegality of the retrospective rate, confirmed. But in delivering the judgment of the Judicial Committee of the Privy Council in this case, a very important distinction as to a retrospective rate was drawn by Sir Thomas Erskine, at that time the Chief Judge of the Court of Bankruptcy. For he says, the rate in question was avowedly made, not only for the purpose of providing for the expenses of the current year, *to all of which their lordships are of opinion it might have been legally applied, whether incurred before or after the making of the rate*, but also for the liquidation of outstanding demands against the parish incurred in former years. It is true the rate is good upon the face of it, and it is also true that such a rate would not be vitiated, although one of its objects might have been to reimburse the churchwardens for expenses incurred by them during the current year.[1]

A rate made to reimburse churchwardens for expenses incurred in the current year is not retrospective.

But if the same churchwardens had been re-elected, this distinction would not apply: so that they could not be reimbursed what they had expended in a former year; for, as it has been observed in a subsequent case,[m] by by Sir H. Jenner, there is no distinction between the case where the same individuals are in office a second year, and when they are different individuals. "It is as churchwardens that they sue; and, as churchwardens, their year of office expires in Easter week; if re-elected, they are the same as new churchwardens."

Payment of debt contracted prior to the year is retrospective.

It has been already said, that the courts of common law have cognizance of those church rates which are made in pursuance of the statutes; and, as to these, it has been held, that the borrowing of money on the credit of the

[1] See same case, Moore's Privy Council Cases.
[m] *Ellis* v. *Gough and Griffin*, 2 Cur. 673.

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rates, to raise a sum for paying off a debt, &c., is to make a retrospective rate; and that the rate made in pursuance of the statutes, for re-payment of the sum borrowed, is illegal.

A parish church had been repaired in 1824, and in 1831 a part of the expenses which had been incurred was still unpaid; to raise which, it had been resolved by the parishioners to borrow the sum required (350*l.*) on the credit of the rates, under statute 59 Geo. III. c. 134, above mentioned. The interest, and the annual ten per cent. of the principal, had been for some time regularly repaid, but the churchwardens, having at last refused to make any further rate for this purpose, it was sought to obtain a mandamus to compel them. In giving judgment, Lord Denman says, "It is a general rule with respect to parish rates, founded on obvious principles of policy and justice, that they are not to be made retrospectively. The payers being a fluctuating body, nothing, generally speaking, is more just or more likely to conduce to economy, than to hold, that they who create a charge, shall themselves bear it. The statute has, to a certain extent, modified this general rule, and the churchwardens are authorised, with the sanction of the vestry, bishop and incumbent, to borrow, on the credit of the rates, such sum of money as shall be necessary for defraying the expense of repairing the church; and they are then empowered and required to raise by rate, a sum sufficient from time to time to pay the interest, and not less than ten per cent. of the principal, until the whole of the money so borrowed shall be repaid. It appears to us that all these provisions point clearly to the limits of departure from the general principle above stated. The consent of the incumbent and bishop appear to have been thought necessary, in order to see that the repairs should be of that onerous and yet permanent nature, which might properly be thrown in part on the payers of succeeding years. Their consent, and that of the vestry, have the effect also of securing the parish from an improvident outlay; and, finally, the provision that the principal and interest shall be paid in ten instalments, *which ought, in our opinion, to be annual*, secures the participation of the existing rate payers in the discharge of the loan, and prevents it from becoming a burthen at any indefinite period on their successors. These obvious purposes of the act, so necessary to prevent abuses of the power given by it, can only be secured by an adherence to the general rule stated above, in all particulars not specially provided for by the clause. We are therefore of opinion, that the

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rate now sought to be imposed would not be authorised by the statute."[n]

The authority of the case last mentioned has been very recently recognised in a case before the Judicial Committee of the Privy Council, in which case Lord Brougham lays it down, that an illegal retrospective payment out of a rate, however small in amount it may be, will nevertheless vitiate the rate; thus carrying the principle much farther than could be inferred from the language of Dr. Lushington in the case of *Chesterton* v. *Farlar*,[o]

A retrospective payment out of a rate, however small, vitiates the rate.

Subject of the rate.

It has been said that the church rate is not chargeable upon the land, but upon the person, in respect of the land, for the more equality and indifferency.[p] But this is not material; for, in substance, it is the land, or whatever rateable property there may be, which is charged; and this is the case with other rates, as the poor rate, where, although by the words of the statute the charge is upon inhabitants and occupiers, yet so fully is the charge considered to be on the land, that in some cases it has been by statute actually transferred from the occupier to the lessor. And so it is said in *Jeffery's case*,[q] if Jeffery should not be charged to the reparation of the church, for lands which he himself occupies, then no person would be charged for them, upon which great inconvenience would ensue; for one who inhabits in the next town may occupy the greatest part of the lands in another town; and so churches, in these days, would come to ruin. But it was resolved, when there is a farmer of the same lands, the lessor, who receives rent for them, shall not be charged in respect of his rent, because there is an inhabitant and parishioner who may be charged, and the receipt of rent doth not make the lessor a parishioner.

Occupiers of land to be charged, whether residing in the parish or not.

And it was by this important case decided that the occupiers of land, although residing in another parish, were in law parishioners of that parish where they so occupied, and rateable accordingly. But if the occupiers are assessed, it matters not by whom the payment is made.[r]

The first positive order on this point appears to be in a constitution of Archbishop Stratford, by which it is ordered that all persons, as well religious as others whatsoever, having possessions, farms or rents which are not of the glebe or endowment of the churches to be repaired, living within the parish or elsewhere, shall be bound to con-

[n] *R.* v. *Churchwardens of Dursley*, 7 Ad. & Ell. 458.
[o] *Pigott* v. *Bearblock*, Privy Council, May, 1844.
[p] Degge, c. 12.
[q] 5 Rep.
[r] 2 Curt. 877.

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tribute, with the rest of the parishioners of the aforesaid churches, as often as shall be needful, to all charges incumbent upon the parishioners concerning their church and the ornaments thereof, by law or custom, having respect unto the quantity of such possessions and rents. Whereunto, so often as shall be necessary, the ordinary shall compel them, by ecclesiastical censures and other lawful means.[s]

By the mention of possessions, farms or rents, it appears that incorporeal as well as corporeal hereditaments are to be charged; and not only so, but it is to be made upon personalty and stock in trade also, unless the usage and custom of the place establishes the contrary; for it is said, according to the ecclesiastical law that prevailed in this realm, the laying of the church rate ought to be according to the lands and the stock which the parishioners have within the parish.[t]

Stock in trade liable to the rate.

And this statement as to the ecclesiastical law has been confirmed in a case before the Delegates in 1823, so far as it was possible that it could be confirmed by the facts of that particular case.[u] In that case a church rate had been made, including stock in trade, which was resisted; and by the libel against the party refusing, it was alleged that the rate was according to the usual and customary mode of making the church rate in the parish of Poole. The long and able arguments of counsel, however, in this case, of which it would be impossible here to give an abstract, are directed to the general liability of stock in trade to the church rate. And though a great variety of cases was adduced and commented on, it was admitted that as no case could be produced in which the rateability of stock to the church had, up to that time, solemnly been pronounced for, so neither was there any instance of a sentence against its legality; and the argument to be thence derived appeared to be, that its legality had never been questioned. The decision in that case, as appears also from a report of the same case, in a further stage,[x] was clearly that the stock in trade was liable; but as no reason appears to have been given as the ground of the decision, it is (as it stands) an express authority only, that the stock in trade, in the particular instance, was liable, although, from what has been said of the arguments adduced, there is no reason to confine its authority, or to suppose that it is

[s] 1 Burn, 381.

[t] Rol. Abr. 389; Prideaux, 81, who cites this as the dictum of John of Athon and Lyndwood, whom he calls the ancientest and best of our canonists.

[u] *Miller* v. *Bloomfield*, 1 Add. 499.

[x] See 2 Add. 30.

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not generally applicable. The act which has been recently passed for exempting stock in trade from the poor rate, does not in any manner affect its liability to church rate.

Directions of the thirteen doctors as to the subject of church rate.

The following directions as to the subject of church rate are said to have been drawn up and agreed upon by thirteen doctors of the civil law, assembled together for that purpose in the common dining hall of Doctors' Commons, touching a course to be observed by the assessors in their taxations of the church and walls of the churchyard of Wrotham in Kent, and to be applied generally, upon occasion of like reparations, to all places in England whatsoever.

1. Every inhabitant dwelling within the parish is to be charged according to his ability, whether in land or living within the same parish, or for his goods there, that is to say, for the best of them, but not for both.

2. Every farmer dwelling out of the parish, and having lands and living within the said parish in his own occupation, is to be charged to the value of the same lands or living, or else to the value of the stock thereupon, even for the best, but not for both.

3. Every farmer dwelling out of the parish, and having lands, and living within the parish, in the occupation of any farmer or farmers, is not to be charged; but the farmer or farmers thereof are to be charged in particularity, every one according to the value of the land which he occupieth, or according to the stock thereupon, even for the best, but not for both.

4. Every inhabitant and farmer occupying arable land within the parish, and feeding his cattle out of the parish, is to be charged for the arable lands within the parish, although his cattle be fed out of the parish.

5. Every farmer of any mill within the parish is to be charged for that mill; and the owner thereof (if he be an inhabitant) is to be charged for his liability in the same parish, besides the mill.

6. Every owner of lands, tenements, copyholds or other hereditaments, inhabiting within the parish, is to be taxed according to his wealth, in regard of a parishioner, although he occupy none of them himself; and his farmer or farmers also are to be taxed for occupying only.

7. The assessors are not to tax themselves, but to leave the taxation of them to the residue of the parish.[y]

Remarks on these directions.

In the case above mentioned of *Miller* v. *Bloomfield*, before the Delegates, some doubts appear to have been thrown upon the authenticity of these directions of the

[y] See 1 Burn's E. L. "Church Rate."

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thirteen doctors; but, at best, the authority of them could be no greater than that allowed to the opinion of any disinterested lawyer; they could have no power whatsoever to make any new law, much less to alter the law as then existing. Although, therefore, great weight may be attached to them, yet where they conflict with any general principle of law, they must be disregarded. Thus as to Number 1, it is clearly erroneous; for it would exempt personalty and stock in trade where the owner had also lands in the parish, while they would be chargeable where the owner had no lands; and it would introduce a vagueness and uncertainty in the subject of the rate, which would be directly contrary to the spirit of the law, and would render the collection of it almost impossible. Numbers 2 and 3 are clearly erroneous for the same reason, so far as they relate to the optional rate on lands or stock, and to the exemption of the one by the charge upon the other. Number 6 is altogether erroneous, being directly opposed to what we have already mentioned to have been laid down in Jeffery's case; and Number 7 is not very intelligible, as the parishioners themselves impose the tax, nor can it be seen in what manner it could be acted on.

It will be seen, therefore, that the subjects of the church rate are more universal than those of the poor rate,[a] and it having been ascertained that all property, of what kind soever, is chargeable generally, we proceed to point out the exceptions from this rule.

Exceptions from the subject of the rate.

In the above-mentioned constitution of Archbishop Stratford it will have been observed, that those things are excepted, which are of the glebe or endowment of the churches to be repaired, an exception which would apply to the lands in whatever hands they might be.[b] But if there are any lands within the parish which are of the glebe or endowment of another church, they are chargeable to the church rate of the parish in which the lands lie, and *à fortiori* lands in the parish which may be the property of any ecclesiastical corporation, whether sole or aggregate, other than the rector or vicar of the parish church, are chargeable. The reason why the glebe or endowment of the same church is not chargeable is because the rector who holds it, or through whom the right is derived, is liable to the repairs of the chancel, and therefore the lay impropriator, being bound to repair the chancel, would be equally exempt in respect of his rectory; but

Glebe or endowments of the church of the same parish.

[a] See statute 3 & 4 Vict. c. 89, by which stock in trade is exempted from the poor rate.

[b] Lyndw. 255.

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as the exemption is not personal, the rector, vicar or impropriator would be liable to the church rate in respect of any lands which he may have in the parish, which are not parcel of the rectory.[b] And it will be observed that these distinctions show more clearly that the rate is in substance on the property and not personal.

Inhabitants of a chapelry.

Gibson says, the inhabitants of a precinct where is a chapel, though it is a parochial chapel, and though they do repair that chapel, are, nevertheless, of common right contributory to the repairs of the mother church. If they have seats at the mother church, to go thither when they please, or receive sacraments or sacramentals, or marry, christen, or bury at it, there can be no pretence for a discharge. Nor can any thing support that plea, but that they have, time out of mind, been discharged; or that, in consideration thereof, they have paid so much to the repair of the church, or the wall of the churchyard, or the keeping of a bell, or the like compositions (which are clearly a discharge).[c]

But the law on this subject, as now fully settled, after careful argument and consideration, in the case of *Craven* v. *Saunderson*,[d] in the Court of Queen's Bench, is not quite as it is above stated by Gibson; for that case seems to have established the law as follows:

When exempt.

Though it is clear that, by the common law, the parishioners of every parish are bound to repair the parish church, yet those of a chapelry may prescribe to be exempt from repairing the mother church; as where the chapelry has existed from time immemorial, and buries and christens within itself, and has *never* contributed to the mother church; but all these things must combine; for it has been held, that the inhabitants of a chapelry, sued for a rate raised for repairing a parish church, do not entitle themselves to a prohibition by showing that they repaired their chapel, and performed there the rites of baptism and marriage *if they buried* at the parish church. But if all these things combine, that is to say, if the inhabitants of the chapelry have no use of the mother church in any way, and have never contributed to its repair from time immemorial, and if the chapel also has existed immemorially, then it shall be intended that the chapel was coeval with the mother church, and not a later erection.[e]

It will be seen, therefore, that the inhabitants of a chapelry are only exempt from contributing to the repairs of the parish church in cases where the chapelry is, and always has been, a separate parish as to all ecclesiastical

[b] Gibs. 197.
[c] 1 Burn, 383.
[d] 7 Ad. & Ell. 880.
[e] And see also 1 Salk. 164.

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purposes. But a particular custom, opposed to the common law, will always require strict proof; and it is supposed that the cases would be very rare in which such a custom, requiring proof of so many things to support it, could be successfully established.

But if a parish consist of several vills, and there is a custom proved to levy the rate in certain proportions, this may be a good custom; for it may be, or in its origin may have been, reasonable.[f]

Another exception from liability to church rates, for the purpose of repairing the mother church, has scarcely at the present day become general; but prospectively it will be of much importance. For in the case of the new districts made such under the church building acts, the inhabitants of those districts remain liable to the repair of the mother church for twenty years only after the consecration of the church or chapel of their district;[g] at the expiration of which time they become exempt. The repairs of such new district churches or chapels are from the time of consecration to be borne by the new district by church rates made in the same manner as in the old parishes.[h] If any district parish should be again subdivided, and a church or chapel built or appropriated for the use of such new division, the commissioners may, by an instrument under their seal, declare that the liability of the inhabitants of the subdivision to repair the church of the district from which they are thus severed shall cease from such time as they may specify. In which case they are liable to repair the original mother church for the residue of the twenty years.[i]

Property of the crown.

Another case of exemption from church rate is, where the property is in the occupation of the crown, directly or indirectly, in which case it seems to be considered that it is exempt *honoris gratiâ*. But this privilege of exemption is personal, and not following the lands; so that, when such property passes from the crown, the privilege of exemption is at end. Thus it has been decided that the governor of Greenwich Hospital, which was originally part of a royal demesne, not being exempted under the last-mentioned exemption as to inhabitants of a chapelry, was liable to be assessed to the church rate, in respect of his premises in such hospital, in his own beneficial occupation.[k]

Stalls in a market.

A person, who has merely a stall in a market, where he sells his goods for a few hours on market days, is not rateable for it to the repairs of the church.[l]

[f] *Burton* v. *Wileday*, Andrews, 32.
[g] 58 Geo. 3, c. 45, s. 71.
[h] Sect. 70.
[i] Sect. 21, 71.
[k] 4 Hagg. 275.
[l] 2 Roll. Abr. 289; 2 Lee, 150.

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Of the authority by which the rate may be imposed.

Having thus spoken of the origin, the objects and the subjects of the rate, we come to speak of the authority by which the rate may be imposed, a subject, our knowledge of which is principally derived from very recent cases; for so long as no regular and systematic opposition to church rates was made, it was most improbable that a case should ever have occurred, in which the question, which has now become so important, could have been raised. And when parishioners, by formal votes of vestry, began to refuse to repair their churches, the ecclesiastical courts were involved in great difficulty. The traditional knowledge of a century hardly sufficed to meet the emergency: the known precedents applicable to the case being too few to allow a decided course of practice to be based upon them, and being in themselves of doubtful or disputed authority.[m]

Probably, the only authority by which a church rate can now be imposed is that of the churchwardens, together with a majority of the parishioners duly convoked and assembled in vestry for that purpose; or of the churchwardens alone, if the parishioners, having been duly summoned, refuse to meet; for, in such a case, the churchwardens would of necessity represent the parish.[n] But if the majority of the parishioners assembled should refuse a rate, then whether the churchwardens, together with the minority, can make any legal rate, is at present a doubtful question; and as the apparent state of the law has only been arrived at, after much litigation, and is not even now acquiesced in, it would appear necessary to mention in what manner and by what authority it has been held that a church rate might be made without the concurrence of the majority.

Attempts to make a legal church rate against the wishes of a majority.

The duty of repairing their parish church is, as has been observed, incumbent on the parishioners; but if, by their power to refuse a rate, they have the option of repairing it or not, and the church may thereby become dilapidated, it was observed, that that was a wrong without a remedy; an anomaly abhorrent to the law of England. And it was, therefore, supposed that, in the case of a refusal by the parishioners, there must exist some power in other parties to impose the rate, and which power might be necessarily set in motion by the courts. This power was supposed to be with the churchwardens, whom the spiritual courts could compel to make a church rate; and who could have no defence or excuse for not doing so, supposing them to have the power. Accordingly, in the parish of Braintree in

[m] Archdeacon Hale, Church Rate Precedents.

[n] *Thursfield* v. *Jones*, 1 Vent. 367, and *Anon.* 1 Mod. 79.

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Essex, in the year 1837,[o] when the parishioners, being duly assembled, had, by a formal vote of the vestry, refused to make any church rate, the churchwardens of their own authority imposed the rate, and took the usual method for enforcing it in the spiritual courts. The party proceeded against moved for a prohibition, and the case was very fully argued and decided in the Court of Queen's Bench; and that decision was fully confirmed in the Exchequer Chamber. It was thereby clearly established that the churchwardens had no such power as that contended for. Lord Denman thus disposes of the objection that, in the refusal of the rate by the parishioners, there exists a wrong without a remedy. "The history of ancient times," he says, "establishes that the law did apply a remedy, such as was found then, and was expected always to continue, amply sufficient to secure the reparation of churches; the proceeding by interdict, which suspended the performance of ecclesiastical rites in the refractory parish; or the proceeding by excommunication against every parishioner. Either of these penalties was too awful in itself, and in the suffering of those who incurred it, to fail of immediately producing the desired effect; or, more probably, the denunciation was alone equal to its purpose, and the mischiefs may never have existed in the earliest times. Perhaps, also, the force and efficacy of the remedy may account for the want of parliamentary provision, which could only have rested on the weaker sanctions of temporal power."

The arguments used in this case, in support of the authority of the churchwardens to make a rate, rested in a great measure upon the authority of a case, decided in the Court of Arches, by Sir W. Wynne;[p] by whom it had been expressly held, on an appeal from the Consistory Court of Peterborough, that "the vestry being called together to make a church rate, and refusing to make it, the law was that, if the parishioners will not make the rate, the churchwarden has a right to make it himself." But that case, as Dr. Lushington observed, contained many incongruities in the statement of facts, and "teemed with eccentricity;" and its authority was altogether overruled by the judgment of the Court of Queen's Bench.

Obiter dictum of Tindal, C. J.

But Tindal, C. J., in giving judgment in the Exchequer Chamber, in affirmance of the judgment of the Court of Queen's Bench, after remarking on the case of *Gaudern* v. *Selby*, in the Court of Arches, and pointing out some

[o] *Burder* v. *Veley*, 12 Ad. & Ell. 233, and *Veley* v. *Burder*, 12 Ad. & Ell. 265.

[p] *Gaudern* v. *Selby*, 1 Curt. 394.

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distinctions between that case and the one before him, apparently relied on those distinctions to avoid the express overruling of its authority; and then added, "We do not enter into the discussion, whether a rate made by the churchwardens at the parish meeting, where the parishioners were then met, would have been valid or not; or how far such a case may be analogous to that of the members of a corporation aggregate, who, being assembled together for the purpose of choosing an officer of the corporation, the majority protest against it, and refuse altogether to proceed to any election; in which case they have been held to throw away their votes, and the minority, who have performed their duty by voting, have been held to represent the whole number. It is obvious, indeed, that there is a wide and substantial difference between the churchwardens alone, or the churchwardens and minority together, making a rate at the meeting of the parishioners, where the refusal takes place; and the churchwardens, possessing the power of rating the parish by themselves, at any time, however distant. It is unnecessary to discuss this point, as the facts of the present case do not bring it before us: it is sufficient to say, while we give no opinion upon it, we desire to be understood as reserving to ourselves the liberty of forming an opinion, whenever the case shall occur."[q]

Remarks on it.

This *obiter dictum* of Chief Justice Tindal appears to have been delivered without that mature consideration, which, if the question had been directly in point, it would have received. Whatever might be the law as applicable to church rates in such a case, it seems obvious that the case of a majority protesting against, and refusing to proceed to any election, cannot be likened to that of a majority entertaining the question, discussing it, and deliberately rejecting it, by adopting an amendment subversive of it. The analogy would only then be complete, if the majority, upon proceeding to the election, should elect an improper officer; and the minority electing a proper one, such officer elected by the minority should be held to be duly elected.

The consequence however of the above dictum was such as might have been expected, and as was perhaps intended. In the same parish the vestry was again duly convened; a church rate was proposed; an amendment refusing it was then moved, and, on a show of hands, declared to be carried; no poll was demanded; and the churchwardens then, together with the minority, remained

[q] 12 Ad. & Ell. 309.

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in the vestry after the majority had left, again proposed the rate, carried it, and signed it at the same meeting. That is to say a church rate was made, as nearly as possible, according to the case supposed by Tindal, C. J. The legality of the rate thus made was argued in the Consistory Court before Dr. Lushington, by whom it was decided that the rate was made without any proper authority, and that the supposed analogy between this proceeding and corporate elections altogether failed.[r]

From this decision, however, an appeal was prosecuted in the Arches Court, and the judgment of Dr. Lushington was there overruled. From that decision, however, an appeal is now pending, and it would be useless therefore to give either of these conflicting decisions at any length, while it is undecided which of them may ultimately be declared to be law. It may be observed, however, that if the judgment of Sir Herbert Jenner, by which that of Dr. Lushington was overruled, be upheld, it will, in effect, render any vote of the parishioners upon this subject a mere form, and altogether futile and inoperative.

But it has been decided that if a church rate has been voted in vestry duly convened, it is no objection to the rate, that it was subsequently drawn up by the churchwardens only.[s]

Cases where the common law courts can interfere to compel the making of a church rate.

That which has been said above of the authority by which a church rate may be made, relates to the usual and ordinary church rates at common law; but as to those church rates which have been mentioned as made in pursuance of certain statutes, the authority by which they may be imposed is, for the most part, pointed out in the statutes themselves; and the courts of common law having jurisdiction over the matter by virtue of the statute, can enforce the rate by a mandamus. And it seems that

[r] *Veley* v. *Gosling*, 3 Curt. During the controversy on this subject, an elaborate collection of precedents, in the cases of church rates, was compiled by Archdeacon Hale, who says in his preface, "I venture to express the opinion that the precedents here published will satisfactorily prove that when the necessity of repairing a church, or of providing the necessary ornaments for divine worship, according to the rites of the Church of England, has been proved by presentment either in the consistory court of the diocese, or before the bishop or archdeacon, or their officials or surrogates, at their visitations, *judicialiter sedentes*, the ecclesiastical judge in such a case, whether bishop, archdeacon, official, or surrogate, has power to authorise and command the churchwardens to call a meeting of the parishioners, and at that meeting to make a rate, or cause it to be made, with or without the consent of a majority of the parishioners." Upon a careful perusal, however, of the documents so elaborately collected, it will be found that they have no influence upon the case supposed, and that the authorities cited by Sir Wm. Follett in his arguments in *Veley* v. *Burder*, in the Exchequer Chamber, are far stronger, and more important, than any of those adduced in Archdeacon Hale's collection.

[s] *White* v. *Beard*, 2 Curt. 485.

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where the money borrowed is to be repaid less often than annually, yet that the court if applied to will compel the raising and laying by a certain annual sum, so as to prevent any violent change in the taxation.[t]

Thus, where a statute exempted parishioners from tithe, and enacted that the churchwardens, overseers, and certain of the inhabitants of the parish, were to make a rate in lieu thereof, out of which certain salaries were to be paid, and the residue applied to the repairs of the church, or to such other church purposes as the churchwardens should think fit; and another statute substituted the vestry for the churchwardens, &c., and the vestry refused to make a rate, the Court of Queen's Bench compelled them by mandamus.[u]

And where a rate, tax, or assessment, was by act of parliament required to be imposed, which was to be allowed by two justices, and there was an appeal given by the act to the quarter sessions against such rate, the court seemed to think that the mere provision for allowance of the rate by two justices, clearly prevented it from being a matter of ecclesiastical cognizance; a mandamus was therefore granted to the vestry to make a rate.[x]

When money has been borrowed on credit of the rates.

In all those cases in which, under the provisions of the statutes, money is to be borrowed on the credit of the rates, the vestry having sanctioned the borrowing as before mentioned, the churchwardens alone have full authority of themselves to make the rate for the purpose of repaying the debt and interest.[y] But the money must have been borrowed on the credit of the rates for a legal purpose; otherwise the churchwardens would not have such authority.[z]

When an ordinary church rate at common law has been made by the competent authority, the ecclesiastical courts have exclusive power of deciding on the validity of the rate, and on the liability of any particular person to pay it. This power arises necessarily out of the 13 Edw. I. which reserves the question of the repairs of churches altogether for spiritual cognizance.[a] But where a parish had been divided by statute, though no permanent division had been made, and there was a provision in the statute that until such permanent division, the vestries of the two parishes should meet to ascertain and apportion the rates, and the churchwardens of one division, on being applied to

[t] *R.* v. *St. Michael's, Pembroke*, 5 Ad. & Ell. 603.
[u] *Reg.* v. *St. Saviour's, Southwark*, 7 Ad. & Ell. 925.
[x] See 7 Ad. & Ell. 936, 937, n.
[y] See ante.
[z] See *R.* v. *Churchwardens of Dursley*, ante.
[a] Rogers's E. L. 995.

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by those of the other division, neglected to give notice of vestry, the Court of Queen's Bench directed a mandamus to compel them to convene a meeting to inquire and agree whether a rate should be made.[b] But, except in a peculiar case of this kind, the interposition of the common law courts at such a stage would be unnecessary, for the ecclesiastical court could compel the churchwardens to call a vestry for the purpose of making a rate; and if, when the parishioners had been thus duly summoned, they refused or neglected to meet, the churchwardens, as already mentioned, would of themselves represent the parish, and be competent to act accordingly.

Remedy for parties aggrieved by the rate.

The usual mode in which questions on church rates are brought under the notice of the ecclesiastical courts, is by a suit instituted by churchwardens for *subtraction of church rate*, (that is, a refusal to pay the sum at which the party has been assessed,) in which suit the defendant may raise any legal objection to the rate as his defence for not paying it; and the question of legality then comes to be decided, but the burthen of proof is with him; the presumption is in favour of the legality of the assessment.[c]

But this, although the most usual, is not the only manner in which the question of validity, or of the proper amount of assessment, can be raised in the ecclesiastical court, for a party aggrieved may enter a caveat against the confirmation of the rate; and where the rate is generally unequal, that is, where a number of persons are aggrieved, this is perhaps the better course. The entering of this caveat against the confirmation of the rate is an appeal to the ecclesiastical judge, who will see right done.[d]

But a rate payer cannot, by an original proceeding in the ecclesiastical court, raise objections to the rate, for the purpose of quashing it altogether. He must make his objections as a defendant, when sued for the rate. His opposition in fact must be passive; there is no process by which he can actively set the ecclesiastical court in motion.

Objections to the rate.

The objections thus raised by him would be either as to the legality and validity of the rate, a subject already treated of; or as to the undue amount of his assessment, which would be a question of fact in each particular case; or as to the omission of other parties out of the rate, an objection which is perhaps included in that last mentioned.

Several cases have been decided as to the invalidity of a rate, from which certain parties have been omitted. To enter fully into these, would probably only tend to con-

[b] *R. v. St. Margaret's and St. John's*, 4 M. & S. 250.
[c] See 4 Hagg. 183.
[d] 3 Phill. 648; 4 Hagg. 87.

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fuse; since the general principle deducible from them is clear, viz. that the omission of parties from the rate is not in itself a fatal objection, even if that omission be admitted. But that such a circumstance may be explained in answer, and that it is upon the sufficiency of that explanation that the court will decide as to whether the omission in the particular case is fatal to the rate or not.[e]

Summary jurisdiction for recovery of rate under 10*l.*

But if neither the validity of the rate, nor the liability of the person from whom it is demanded, be disputed, and the amount does not exceed 10*l.*, the rate subtracted may be recovered in a less troublesome and expensive manner. For when any person rated to church or chapel rate (the validity of which has not been questioned in any ecclesiastical court) refuses payment, any justice of the county, city, &c. on complaint of any churchwarden, may convene by warrant such person before two or more justices, who may examine on oath into the merits of the complaint, and may order under their hands or seals payment of any sum so due not exceeding 10*l.* besides costs; to be recovered, if payment is not made, by distress and sale of the goods of the offender, under the warrant of any one of such justices.[f]

And it has been held that the complaint under this statute of one churchwarden only, in a parish where several churchwardens are appointed, is sufficient.[g] And it has also been held, that it is sufficient if made by the churchwardens *de facto*.[h]

Appeal in such cases.

Any person aggrieved by any such judgment of the two justices, may appeal to the next general quarter sessions of the county wherein the church or chapel is situated; and if the justices, or a majority of them, shall affirm the judgment, it shall be decreed by order of sessions with costs against the appellant, which are to be levied by distress and sale of the appellant's goods. Provided that in case any such appeal is thus made, no distress warrant shall be granted until after its determination.

Cases not within the summary jurisdiction.

It is further provided that nothing in the statute from which the above is extracted, shall alter the jurisdiction of ecclesiastical courts to hear and determine causes touching the validity of any church or chapel rate, or from proceeding to enforce the payment of any such rate, if exceeding 10*l.* from the party proceeded against. If the validity of

[e] See 3 Phill. 640; 2 Adol. 33; 1 Curt. 345; 2 Moore, P. C. 320.

[f] 53 Geo. 3, c. 127, s. 7, and 54 Geo. 3, c. 68, s. 7.

[g] *R.* v. *Sheriff of Lancashire*, L. J. R. M. C. 103; and *R.* v. *Fenton*, 1 Gale & D. 17.

[h] *Reg.* v. *St. Clement's, Ipswich*, 3 P. & D. 481.

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such rate, or the liability of the person from whom it is demanded, be disputed, and the party give notice thereof to the justices, they shall forbear giving judgment thereon, and the persons demanding the same may proceed to recover their demand by due course of law, as before accustomed. Neither is anything in the statute to affect parliamentary regulations respecting church or chapel rates of any particular parishes or districts.[i] And this statute has been further explained by a subsequent statute,[k] which declares that no suit for church rates under the value of 10*l.* shall, save in the excepted cases already mentioned, be instituted in any court, or be attempted to be enforced in any other manner than by this summary jurisdiction. The effect of which enactment has been decided to be, that where the validity of the rate or the liability of the party is undisputed, the jurisdiction of the ecclesiastical court is so completely ousted, that prohibition would lie to a suit there for enforcing the rate.[l]

The levy by distress.

And the distress by which the payment of rates may be thus enforced, may be made out of the particular district, for it is enacted that the goods and chattels of any person neglecting to pay any sum legally assessed on him for any church cess for seven days after demand made, may be distrained not only within the parish, district, &c. in which it is made, but also within any other parish within the same county or jurisdiction; but if sufficient distress cannot be found within such county, then on oath thereof made before any justice of the peace of any other county in which any of the goods of such person shall be found, (which oath such justice shall certify by endorsing his name on the warrant granted to make such distress,) such goods shall be liable to such distress and sale in such other county, and may under such warrant and certificate be distrained and sold, as if found within the district or parish in or for which the rate was due.[m]

The justice cannot issue his warrant unless it is made affirmatively to appear before him, that the amount does not exceed 10*l.*, and that no question is made on the rate in the ecclesiastical court. And as soon as it appears that the validity of the rate is disputed, and that the case is not merely one for enforcing payment, the summary jurisdiction of the magistrates is altogether at an end, and the ecclesiastical jurisdiction attaches,[n] and this although the

[i] 53 Geo. 3, c. 127, s. 7.
[k] 5 & 6 Will. 4, c. 74.
[l] *Richards* v. *Dyke*, 2 Gale & Dav. 493.
[m] 54 Geo. 3, c. 170, s. 12.
[n] *Ricketts* v. *Bodenham*, 4 Ad. & Ell. 433.

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question as to the validity of the rate is no longer depending.[o]

Notice to dispute validity of the rate, which takes away the summary jurisdiction.

Several cases have been decided as to what is a sufficient notice to the justices of the party's intention to dispute the validity of the rates, and thereby to withdraw the matter from their jurisdiction. Thus in one case the party, upon being brought before two justices for not paying the rate, declared in their presence, "I will bring an action against any person who ventures to levy the rate: I think I have no right to pay: I have no claim or seat in the church." Words which were considered a sufficient notice of an intention to dispute his liability to pay.[p] And after such a decision it will be seen that no formal notice of an intention to dispute is necessary, but that, on the contrary, a very slight expression may be construed to be a sufficient notice. But there is another rule established by decisions which appears in some degree to conflict with this last; for it is established that the justices must hear the complaint, unless they are satisfied that the party has a *bonâ fide* intention of disputing the rate; a matter as to which they could scarcely be satisfied by such vague expressions as that in the above case. Thus where the attorney of the party proceeded against appeared before the magistrates, and stated on his behalf that he disputed the validity of the rate, and that a caveat had been entered for the purpose of trying the question, (which was the fact,) but did not say on what ground the rate was objected to, the magistrates dismissed the case without any examination on oath, the attorney objecting to be sworn. But Lord Tenterden granted a mandamus to compel them to hear the complaint,—saying, if upon the hearing the party satisfied the justices that there is a *bonâ fide* intention to dispute the rate, the proceedings against them will go no further.[q] It may be observed, that this last case was subsequent to that before mentioned; and that it appears from it that the magistrates should in each case be satisfied that there is a *bonâ fide* intention to dispute the rate.

The statute provides that if any action be brought for any thing done in pursuance of it, such action must be brought within three calendar months of the act committed.[r] And where a constable, under a warrant of distress by virtue of the statute, broke open the door of and entered a dwelling-house, it was held, under this provision of the statute, that, although he acted illegally, yet, as it was not shown that he acted with any other intention than

[o] *R.* v. *Sillifant*, 4 Ad. & Ell. 354.
[p] *R.* v. *Milnrow*, 5 M. & S. 248.
[q] 2 Barn. & Ad. 648.
[r] Same act, sect. 12.

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that of executing the authority delegated to him by the warrant, no action could be maintained after the expiration of the three calendar months.[s]

Indirect authority of Court of Q. B. in ordinary church rates.

But, besides the jurisdiction of the ecclesiastical courts in the matter of church rates, that of the courts of common law in the case of church rates by statute, and of the summary jurisdiction of the justices last mentioned, the Court of Queen's Bench has an indirect authority in the case of ordinary church rates at common law, arising out of their power of prohibition, which is a writ issued by that court when it appears to it by the libel in the outset, or is shown on the face of the proceedings, that an inferior court is entertaining a suit in a matter which is beyond its jurisdiction.[t] The subject of prohibition has been repeatedly very fully argued and decided with great learning and ability; and though the principle has always remained as just stated, yet it will be obvious that it is a principle very difficult of application, since it involves the necessity of first deciding on the extent of the jurisdiction of the inferior court in question. The obvious reason for the jurisdiction by writ of prohibition is the danger of a different decision of the same rights and even of the same identical interests by different courts; an impropriety, as Blackstone observes, which no wise government can or ought to endure.[u]

Prohibition.

The proper limits of the jurisdiction of the ecclesiastical courts in matters of church rates, and the point at which the common law courts will interfere, has been recently very fully argued and discussed in the case of *Veley* v. *Burder*. It is there said that the spiritual court has power and jurisdiction, by ecclesiastical censures, to compel churchwardens to perform their duty in relation to the repairs of the church; to compel the parishioners to perform their duty in providing a means to make such repairs; and after a legal rate has been imposed, to compel each individual to contribute the sum assessed upon him. But if a custom or prescription comes in question, or if the ecclesiastical court takes upon itself the construction of statute law, and decides contrary to the construction which is put upon the statute by the temporal courts; or if the ecclesiastical court, which is bound to declare the common law in the same manner as the common law courts would do, declares it otherwise, then the jurisdiction of the common law courts to interfere by prohibition immediately begins.

[s] *Theobald* v. *Crichmore*, 1 B. & Ald. 227.
[t] Lord Denman in *Burder* v. *Veley*.
[u] 3 Black. Com. 112, 113.

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Thus, if the ecclesiastical court should entertain a suit for that which, although called a rate upon the libel, is in fact a burthen imposed on the parishioners by persons who had no authority to impose it, upon the principles of the common law, the Court of Queen's Bench is bound to interfere. And it may be laid down generally that in every case in which, according to what is said in this chapter, the rate would be considered illegal, the Court of Queen's Bench would be bound to interfere and to prohibit the ecclesiastical court, if that court should be proceeding to deal with and enforce the rate as if it were legal.

This power of prohibition may therefore in some cases prevent the enforcement of the rate by the spiritual court; while, on the other hand, the Court of Queen's Bench has no power to enforce a church rate at common law; but the prevention is only in the particular cases and on particular grounds; the general enforcement of church rates, when legal, remains a matter of sole and exclusive jurisdiction of the spiritual courts.[x]

[x] For the preceding observations see generally the judgment of Sir N. Tindal in the Exchequer Chamber in *Veley* v. *Burder*.

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BOOK V.

OF BENEFICES AND THINGS INCIDENT THERETO.

CHAPTER I.

OF THE MANNER IN WHICH COMPLETE POSSESSION OF A BENEFICE IS TO BE OBTAINED.

Section 1.

Of Advowsons and Presentations.

Advowsons with reference to those in whose favour the right is exercised.

Of the law respecting advowsons and presentations generally there is much which appears foreign to the purposes of our present work, and which might seem more proper to be spoken of in a treatise on incorporeal hereditaments. An advowson has been called a reversionary right to be exercised in favour of another person, which other person must be an ecclesiastic. In the following pages, therefore, it will be endeavoured, so far as possible, to consider this subject only as it affects the clergyman or the party in whose favour the right is exercised. For the many questions that may occur or have occurred between parties claiming to exercise such right, we must refer generally to those works that have treated on incorporeal hereditaments.

Origin of advowsons.

In the early ages of Christianity the nomination to all ecclesiastical benefices belonged to the Church. When the piety of some lords induced them to build churches upon their estates, and to endow them with glebe lands, or to appropriate the tithes of neighbouring lands to their support, the bishops, from a desire of encouraging such pious undertakings, permitted those lords to appoint whatever clergyman they pleased to officiate in such churches, and receive the emoluments annexed to them, reserving however a power to themselves to judge of the qualifications of those

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who were thus nominated.[a] This practice, which was originally a mere indulgence, became in process of time a right; and all those who had either founded or endowed a church claimed and exercised the exclusive privilege of presenting a clerk to the bishop whenever the church became vacant.[b]

Description of advowson.

An advowson is therefore a right of presentation to a church or ecclesiastical benefice; the word being derived from *advocatio*, which signifies *in clientelam recipere*; for in former times the person to whom this right belonged was called *advocatus ecclesiæ*, because he was bound to defend and protect both the rights of the church and the incumbent clerks from oppression and violence; hence the right of presentation acquired the name of advowson, and the person possessed of this right was called the patron of the church.[c]

Advocatio medietatis ecclesiæ.

Lord Coke says there may be several patrons and two several incumbents in one church; the one of the one moiety, and the other of the other moiety; and one part, as well of the church as of the town, allotted to the one, and the other part thereof to the other, which is called *advocatio medietatis ecclesiæ.*[d]

Rights of presentation and of nomination distinct.

The right of presentation and that of nomination to a church are sometimes confounded; but they are distinct things. Presentation is the offering a clerk to the bishop, nomination is the offering a clerk to the patron. These rights may exist in different persons at the same time. Thus a person seised of an advowson may grant to A. and his heirs that whenever the church becomes vacant he will present to the bishop such person as A. or his heirs shall nominate. This is a good grant, and the person to whom the right of nomination is thus granted, is, to most purposes, considered as patron of the church.[e]

Rights of trustees and mortgagees.

Where the legal estate in an advowson is vested in trustees, they have the right of presentation in them; but the right of nomination is in the *cestui que trust.* So in the case of a mortgagee of an advowson, the mortgagee has the right of presentation, but the mortgagor has the right of nomination.

Advowsons appendant.

Advowsons are either appendant or in gross. The right of presentation, which was originally allowed to the persons who built or endowed a church, became by degrees annexed to the manor on which it was erected, for the endowment was supposed to be parcel of the manor, and held of it; therefore it was natural that the right of pre-

[a] 1 Inst. 17 b, 119 b; Wats. 64.
[b] Cruise's Dig. tit. xxi. c. 1.
[c] 1 Inst. 17 b.
[d] Ibid.
[e] Plowd. 529; Wats. 90.

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sentation should pass with the manors, from whence the advowson was said to be appendant to the manor, being so closely annexed to it that it passed as incident thereto by a grant of the manor.

In gross.

Where the property of an advowson has been once separated from the manor to which it was appendant by any legal conveyance, it is then called an advowson in gross, and never can be appendant again, except in a few particular cases, which will be mentioned hereafter.[f]

Presentative.

Advowsons are also presentative, collative, and donative. An advowson presentative is that which has been already described, namely, where the patron has a right of presentation to the bishop or ordinary, and also to demand of him to institute his clerk, if duly qualified.[g]

Collative.

An advowson collative is where the bishop and patron are one and the same person. In which case, as the bishop cannot present to himself, he does, by the one act of collation or conferring the benefice, the whole that is done in common cases by both presentation and institution.

Advowsons donative.

An advowson donative is where the king, or any subject by his license, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, not to that of the ordinary, and vested absolutely in the clerk, by the patron's deed of donation, without presentation, institution or induction.[h]

And this last is said to have been anciently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of Archbishop Beckett, in the reign of Henry II. And therefore, though Pope Alexander III., in a letter to Beckett, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shows what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island; and in proof of it they allege a letter from the English nobility to the pope, in the reign of Henry III., recorded by Matthew Paris, which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endea-

[f] Cruise's Dig. tit. xxi. c. 1. [g] 2 Black. Com. 22. [h] Ibid.

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voured to introduce a kind of feodal dominion over ecclesiastical benefices, and in consequence of that began to claim and exercise the right of institution universally, as a species of spiritual investiture.[i]

May become presentable.

But advowsons donative are not regarded with any favour by the law, which loves uniformity; and therefore, if the patron of an advowson donative once presents to the ordinary, and allows of the admission and institution of his clerk thereon, he thereby renders his church always presentable, and it will never afterwards be donative. But if a stranger, who has no title, presents a clerk to the ordinary, who is instituted and inducted, this will not render the donative presentable.[k]

If a donative should receive augmentation from Queen Anne's Bounty, which it cannot do without the consent of the patron under his hand and seal, it becomes liable to lapse, and subject to the visitation and jurisdiction of the ordinary as a presentative living.[l]

How advowsons appendant or in gross may be aliened.

An advowson appendant may be aliened by any kind of conveyance that transfers the manor to which it is appendant. An advowson in gross may also be aliened; but being an incorporeal hereditament, and not lying in manual occupation, it does not pass by livery, but must always have been granted by deed; and although the law does not consider the exercise of the right of presentation as of any pecuniary value, or a thing for which a price or compensation ought to be accepted, yet the general right to present is considered as valuable, and an object of sale, which may be conveyed for a pecuniary or other good consideration.[m]

Particular estate in advowson appendant.

Where a person has only a particular estate in a manor to which an advowson is appendant, he can of course only alien the advowson for so long as his estate shall continue.

A tenant in tail of a manor to which an advowson was appendant, granted the next avoidance of the advowson, and died: the issue entered on the manor, and the grant was held to be void.[n]

And so, in another case, tenant in tail and his son joined in a grant of the next avoidance of a church: the tenant in tail died. It was adjudged that the grant was void against the son and heir that joined in the grant, because he had nothing in the advowson at the time of the grant, neither in possession nor right, nor in actual possibility.[o]

Advowson in gross is assets for payment of debts.

It is said by Lord Coke, that an advowson is assets to satisfy a warranty; but that an advowson in gross is not

[i] 2 Black. Com. 23. [k] Ibid.; Wats. 170; 1 Inst. 344 d.
[l] 1 Geo. 1, s. 2, c. 10. [m] *Crispe's case*, Cro. Eliz. 164; Cruise, ibid.
[n] *Bowles* v. *Walker*, 1 Roll. Ab. 343. [o] *Wyvel's case*, Hob. 45.

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extendible upon a writ of elegit, because no annual value can be set upon it. It has, however, been determined that an advowson in gross, whether the proprietor has a legal or an equitable interest therein, is assets for payment of debts, and will be directed to be sold by the Court of Chancery for that purpose.

John Tong being indebted to several persons, by judgment, bond and simple contract, in great sums of money, died intestate, seised in fee, among other things, of the trust of an advowson in gross. Upon a bill filed by the creditors of John Tong, praying a sale of his real estate for the payment of his debts, a question arose whether this advowson was assets. Lord King decreed that it was, and should be sold for the payment of Tong's debts. On an appeal from this decree to the House of Lords, it was insisted by the appellants that this advowson was not assets at law, or liable to the demands of any of the creditors of Tong; because at law no inheritance was liable to any execution that was not capable of raising some profits towards satisfaction of the debt, which an advowson was not. On the other side it was contended that, at common law, an advowson in fee was an hereditament descendible to the heir, valuable in itself, and saleable, and even capable, if necessary, of having an annual value put upon it, and was therefore legal assets in the hands of the heir. The decree was affirmed, with the concurrence of all the judges.[p]

Partial estates in advowsons.

An advowson may not only be alienated for ever, or for life or for years, but it may be divided, and a lesser estate or right in it may be granted; for an advowson being a right to present or appoint whenever the church is vacant, that right may be granted for one turn, or for as many turns as the grantor may choose; after which it shall revert to him again. The right to the next presentation therefore is often found separated from the advowson, but it is nevertheless a part of the latter estate, although temporarily severed from it, and existing in a different party.[q]

Right of presentation.

Where the crown acquires right to present.

If the crown acquires a right to present to a church, that is not considered as the next presentation, so that the right of a grantee of the next presentation should be thereby prejudiced, but such grantee is to have the next presentation, upon the avoidance by the presentee of the crown. Sir K. Clayton being seised in fee of an advowson, the church being then full, by a deed poll granted to M. Kenrick, his executors, &c., the next presentation, donation, and free disposition of the said church, as fully, freely and

[p] *Tong* v. *Robinson*, 3 Vin. Abr. 144; 1 Brown's P. C. 114.
[q] *Crispe's case*, Cro. Eliz. 164; Cruise, ibid.

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entirely, as the said Sir K. Clayton or his heirs. The person who was then incumbent was made Bishop of Rochester, whereby the church became vacant; and the king, by reason of his royal prerogative, acquired a right to present a fit person to the said church. It was contended that, in the event that had happened, this grant became void; that in the case of *Woodley* v. *Episc. Exeter*, it was held the grantee of the next avoidance must have the next or none at all, and must lose his right by the intervention of the prerogative, on the promotion of the incumbent to a bishopric. On the other side it was argued that the authority of the case of *Woodley* v. *Episc. Exeter* was expressly contradicted by the note in the margin of Dyer, 228 b, which was apparently the same case, where it was stated to have been resolved by the court, that the grantee should have the next avoidance after the prerogative presentation, because that was the act of the law, and the prerogative of the king, which excluded him from the first presentation, injured no one. The Court of Common Pleas held that the grantee of the next presentation should present on the next vacancy occasioned by the death or resignation of the king's presentee. This judgment was affirmed by the Court of King's Bench, and afterwards by the House of Lords, with the assent of the judges.[r]

Who may exercise the right of presentation.

With respect to the persons capable of exercising the right of presentation, all those who are seised in fee simple, fee tail, or for life, or possessed of a term for years, of a manor to which an advowson is appendant, or of an advowson in gross, may present to the church. And where a person is entitled to an advowson in right of his wife, he must present in his own name and that of his wife, and not in his own name only, in right of his wife.

When the right devolves to the executor or heir.

Where a person is seised of an advowson, and the church becomes vacant in his lifetime, if he dies before he has presented, the right of presentation devolves to his executors or administrators, because it is considered as chattel real. But if the incumbent of a church be also seised in fee of the advowson of the same church, and dies, the right to present will devolve to his heir, and not to his executor; for the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred, as the most ancient and worthy.

Distinction where the advowson is presentative or donative.

If a person seised of an advowson dies after avoidance, and before he has presented, in some cases, as stated above, the right devolves upon the executor; in others upon the

[r] Vide *R.* v. *Ep. London*, 1 Show. R. 441; 6 T. R. 439, 778; Cro. Jac. 691; 8 Bro. P. C. 71; 2 H Black. R. 324.

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heir or other person entitled to the advowson. Upon this subject a distinction must be observed where the advowson is presentative or donative, and where it is in lay or ecclesiastical hands. Where the advowson, either in gross or appendant, is presentative and in lay hands, if the person seised of the advowson dies after avoidance, and before presentation, the right devolves upon his executor. But if the advowson be donative, the right will devolve upon the heir.

An infant of any age may nominate or present.

Lord Coke says, a guardian in socage of an infant seised of a manor, to which an advowson is appendant, shall not present to the church, because he can take nothing for the presentation for which he may account to the heir; and therefore the heir shall in that case present, of what age soever he be. This doctrine is now fully established; and in the following case it was determined, that an infant who was not a year old might nominate or present to a church.

Case of right of nomination exercised by an infant, and allowed.

Cyrill Arthington conveyed an advowson to trustees, upon trust to present such son of a particular person as should be capable of taking the same, when the church became void; and if that person had no son qualified to take the living at that time, then in trust to present such person as the grantor, his heirs or assigns, should appoint; and in default of such nomination by the grantor or his assigns, that the trustees should present a person of their own choosing. The grantor died, leaving his son and heir an infant of six months' old. The living became vacant; and the person named in the deed having then no son capable of taking the living, the guardian of the son took him in his arms, and guided his pen in making his mark; and made him seal a writing, whereby one Hitch was nominated and appointed to the trustees, in order to be presented by them to the living. The trustees supposing the plaintiff, as an infant, unable to make such an appointment, refused to present Mr. Hitch; upon which the infant brought his bill against the trustees, to have them execute their trust in presenting his nominee.

Lord King said,—An infant of one or two years old may present at law; then why may they not nominate? Does the putting a mark and seal to a nomination require more discretion than to a presentation? The guardian is supposed to find a fit person, and the bishop to confirm his choice; and if this is permitted in law, why should a court of equity act otherwise in equitable estates. Decree for the plaintiff.

Upon this case it has been observed that, although the

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decision removes all doubts as to the legal right of an infant of the most tender age to present, still it remains to be seen whether the want of discretion would not induce a court of equity to control the exercise, where a presentation was obtained from an infant without the concurrence of the guardian. But a court of equity would rather look to the interests and advantages of the infant than to the right of the guardian, and would be guided by that principle if it interfered to control the exercise of the right, whether the presentation had been obtained by the guardian or any other.

Joint tenants.

Where an advowson is held in joint tenancy, all the joint tenants must join in making the presentation, as in the case of an advowson vested in trustees and their heirs.

Coparceners.

And this is also the case with coparceners, to whom an advowson has descended; but with them there is this further rule, that, if they cannot agree to present jointly, the eldest sister shall have the first turn, the second the next, and so of the rest according to their seniority. And this privilege extends not only to the heirs, but also to the assignees of each coparcener, whether they acquire a portion of the estate by conveyance or by the act of law; as tenant by the courtesy, who shall have the same privilege of presenting in turn, as his wife would have had if she had been alive. And this was so decided in the following case.

May assign their turn.

The estate of an advowson descended to two daughters as coparceners; the church became vacant twice in their time, and both joined in presentation; the eldest married, settled her estate in the common way, and died. A vacancy happening, the husband of the eldest, entitled to her estate as tenant by the curtesy, or under the settlement, claimed to present. The question was, whether the alternate turn of presentation among coparceners continued to the grantee: that is, whether the persons to whom it was conveyed were to be considered as enjoying the same privileges of presenting in turn, as the sisters and parceners, if they had their own estate.[r] Mr. Baron Clarke was clearly of opinion, upon the authority of the passage in 2 Inst. 365, that the husband of the eldest sister was entitled to the presentation.

Where an advowson descends to coparceners, though one present twice, and thereby usurps upon her coheiress, yet she that was negligent shall not be barred, but another time shall have her turn to present when it falls.[s] And Lord Coke, in his comment on this statute, says, "If a

[r] *Buller* v. *Epis. Exeter*, 1 Ves. 340. [s] Stat. Westm. 2, c. 5.

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stranger usurps in the turn of any of them, this does not put her sister out of possession, in respect of the privity of estate, no more than if one coparcener take the whole profits."[t]

There were four coparceners of an advowson. The first daughter presented to the first avoidance; the second daughter to the second; on a third avoidance, a stranger usurped on the third daughter, and presented: the presentee was instituted and inducted, and died. The fourth shall not lose her turn by the third daughter's suffering a stranger to present by usurpation, but shall present to that avoidance.[u]

Mortgagor of advowson may nominate.

Where a person mortgages an advowson, the legal right to present is transferred to the mortgagee; yet he cannot present a clerk of his own choice, whether the advowson be appendant or in gross. For since the presentation is gratuitous, and the mortgagee cannot account for any benefit from it, a court of equity will compel him to present the nominee of the mortgagor.

A petition was presented on behalf of a mortgagor, that the mortgagee of a naked advowson might accept of his nominee, and present him upon an avoidance, the incumbent being dead. It was insisted for the mortgagee, that as there was a large arrear of interest, he ought to present, if any advantage accrued from it; and the case in Peer Williams was cited, where the plaintiff's father, being possessed of a ninety-nine years' term of the advowson of Eckington, made a mortgage thereof to the defendant, and in the mortgage deed was a covenant that on every avoidance of the church the mortgagee should present; in which the court gave no opinion, but seemed to incline that the mortgagee had a right to present.[x] Lord Hardwicke was of opinion that the mortgagor ought to nominate; and that it was not presumed any pecuniary advantage was made of a presentation. He observed that these were indifferent securities, but the mortgagee should have considered it before he lent his money: and, instead of bringing a bill of foreclosure, as he had done in this case, should have prayed a sale of the advowson. The next day he mentioned that he was not clear as to this point; and that he had looked into the case of *Gardiner* v. *Griffiths*, according to the statement of it in the House of Lords, where the decree of Lord King was affirmed, and said that was a

[t] 2 Inst. 365.

[u] Com. Dig. ibid.; *Barker* v. *Lomax*, Willes, R. 659; Bro. Ab. tit. *Quare impedit.*

[x] *Gardiner* v. *Griffiths*, 2 Peer Williams, 404.

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mixed case; and that he doubted himself whether a covenant, that the mortgagee should present, as was the case there, was not void; being a stipulation for something more than the principal and interest; and the mortgagee could not account for the presentation. The question was adjourned for farther consideration to the next day of petitions, when the mortgagee, not being able to find any precedent in his favour, gave up the point of presenting; and an order was made that the mortgagor should be at liberty to present, and the mortgagee was obliged to accept of the mortgagor's nominee.[y]

And so, where the legal estate in an advowson is vested in trustees, they have the legal office of presenting the clerk; but the *cestui que trust*, or beneficial owner, has the right of nominating to the vacant benefice.

Presentation and nomination.

And these two last cases of trustees and mortgagees exemplify the difference and distinction between the right of presentation and nomination. These terms are often used as synonymous; for where the legal and beneficial estates are not separated, but exist in the same person, as in ordinary cases, only one act is done, which is correctly termed presentation; but when the legal and beneficial estates exist in different parties, as in the above cases, each has his office to perform; two acts are necessary; and one party must nominate, in order that the other may present.

Bankrupt may present upon an avoidance before the advowson is sold.

It has been held, that if a patron of a church is a bankrupt, and the church becomes void before the advowson is sold under the commission, the bankrupt shall present, or nominate to the church, and the assignees of the bankrupt are authorised to execute all powers which the bankrupt could legally execute for his own benefit, except the right of nomination to any ecclesiastical benefice. As the void turn cannot be sold, it is not assets for the benefit of the creditors.[z]

Persons who may not exercise the right.

With respect to the persons who are disabled from presenting to a church, none but natural born subjects can exercise this right. Therefore, if an alien purchases an advowson, and the church becomes vacant, the crown shall have the presentation.[a]

Aliens.

Outlaws.

Where a person seised of an advowson is outlawed, and the church becomes vacant while the outlawry is in force, such person is disabled from presenting, and the avoidance is forfeited to the crown.[b]

Lunatics.

A lunatic cannot present to a church, nor can his committee. But the Lord Chancellor, by virtue of the general

[y] *Mackenzie* v. *Robinson*, 3 Atk. 559.
[z] Wats. 106. [a] Ibid. [b] Cruise's Dig. tit. xxi. c. 2.

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authority delegated to him by the crown, presents to all livings whereof lunatics are patrons, whatever the value of them may be: generally, however, giving it to one of the family. Doctor Woodeson says this right was first asserted by Lord Talbot, whose example has been followed by all his successors.[c]

Roman Catholics.

By the statute 1 W. & M. sess. 1, c. 26, every person who shall refuse or neglect to subscribe the declaration mentioned in an act of that parliament, intituled "An Act for the better securing the Government by disarming Papists," shall be disabled to make any presentation to a benefice. And the chancellor and scholars of the universities of Oxford and Cambridge shall have such presentation.

The presentation to the livings situated south of the Trent belong to Oxford; and those situated north of that river belong to Cambridge.[d]

Trustees of Roman Catholics.

By the third section of this statute, the trustees of Roman Catholics are disabled from presenting to any benefice. And by the fourth section, such trustees, by presenting without giving notice of the avoidance to the vice-chancellor of the university, to whom the presentation shall belong, within three months after the avoidance, become liable to a penalty of 500*l*.

By the statute 12 Ann. st. 2, c. 14, s. 1, Roman Catholics are disabled from presenting to any benefice, and every such presentation is declared void to all intents and purposes. By the statute 11 Geo. II. c. 17, s. 6, every grant made of any advowson or right of presentation, collation, nomination, or donation to any benefice, by any person professing the Catholic religion, or by any mortgagee or trustee of such person, shall be null and void, unless it be for valuable consideration to a Protestant purchaser.

Restrictions on the rights of Roman Catholics still in force.

The above restrictions on the rights of Roman Catholic subjects remain in full force, notwithstanding the act commonly called the Catholic Emancipation Act; for it expressly provided, that nothing therein contained shall extend to enable any person, otherwise than he was then by law enabled, to exercise any right of presentation to any ecclesiastical benefice whatsoever, or to repeal, vary, or alter in any manner the laws then in force in respect to the right of presentation to any ecclesiastical benefice.[e]

But where a Roman Catholic and a Protestant are copatrons of an advowson, the right of presentation is in the latter alone; for the statute which gave the right of

[c] Wood. Lect. vol. i. 409. [d] Cruise, ibid. [e] 10 Geo. 4, c. 7, s. 16.

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presentation to the universities, only gave them the power to present in a case where by the recusancy of one or all of the patrons, there would be no one capable of exercising the right, when the whole power of presentation would devolve to them. But the case of transfer, where some or one only of the co-patrons are disabled, is either a *casus omissus*, or was intended to have been excluded by the legislature.[f]

Section 2.

Of Presentation, Admission and Institution.

The nature of an advowson being explained to be a right of presentation, we next come to inquire in what manner this right is to be exercised; for four things are necessary, before the party in whose favour this right has been exercised can become a complete incumbent: these are, 1. Presentation. 2. Admission. 3. Institution. 4. Induction.

Presentation, what it is.

1. Presentation is the offering a clerk by the patron or proprietor of an advowson to the ordinary; which might formerly have been done either by word or writing, but, since the Statute of Frauds,[g] it is necessary that all presentations be in writing, and a presentation in writing is a kind of letter, not a deed, from the patron to the bishop of the diocese in which the benefice is situated, requesting him to admit to the church the person presented.

May be revoked or varied.

A presentation, though duly made in all respects, may be revoked or varied. This was always held with respect to the king, but was doubted as to lay patrons. It appears, however, to be now fully settled, that a lay patron may revoke his presentation at any time. Blackstone has observed, that a presentation was certainly revocable by the principles of the common law, because it vested no right in any one, not even in the clerk presented; for if the clerk had a right, the law would give him a remedy to recover it when invaded. There was, however, no species of common law action open or competent to a clerk to recover a presentation, when obstructed by the patron only.

Confers no interest.

And it was said, *arguendo*, in the House of Lords, that a presentation conferred no interest whatever.[h]

Person presented must be in priest's orders.

No person is capable of being admitted to any parsonage, vicarage, benefice, or other ecclesiastical dignity, promo-

[f] *Edwards* v. *Bishop of Exeter*, 5 Bing. N. S. 655. [g] 29 Car. 2, c. 3, s. 4.
[h] *Rogers* v. *Holled*, 2 Black. R. 1040; 1 B. P. C. 117; Cruise, tit. xxi. c. 2.

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tion or preferment, before such time as he shall be ordained priest in the form and manner prescribed in the Book of Common Prayer. And any man presuming to be admitted, not having such ordination, is to forfeit 100*l.*[i]

The consequence of this would be, that no person can be properly presented, until he is of the age of twenty-four years at the least, as, before that age, he is incapable of being ordained priest.

At what time this is necessary.

There does not seem, however, to be any reason why a deacon, or even a layman, may not be presented, provided he be in priest's orders at the time of admission, or, as it has been said, at the time of institution.[k] This proposition however has been controverted;[l] but the cases relied upon to disprove it are not cases of presentations to livings, but to the mastership of a school or lectureship.[m] There exists however no doubt, but that the party must be in priest's orders before the time of institution.

A person not to present himself.

No person can present himself, yet if he offer himself to the ordinary, and pray to be admitted, such admission may be good. It has been said, that the regular way is to make over the right to some other, before avoidance.[n]

Aliens.

Whether an alien, being a priest, can be presented, is a matter on which the authorities do not seem to agree. Lord Coke expressly says, "upon consideration had of the statutes 3 Rich. II., 7 Hen. IV., 1 Hen. V., 6 Hen. IV., 4 Hen. VI., if an alien, or stranger born, be presented to a benefice, the bishop ought not to admit him, but may lawfully refuse him, which we have added, for that the abridgments or late impressions may deceive you."[o]

Examination of party presented by the bishop.

When the party has been thus presented to the bishop, the bishop is to judge of his qualification, and whether he is a fit person to be instituted. By the ancient laws of the church, and particularly of the Church of England, the four things in which the bishop was to have full satisfaction in order to institution, were, 1. Age. 2. Learning. 3. Behaviour. 4. Orders.[p]

For this purpose, therefore, the party presented may be examined by the bishop. And though it is not usual, in ordinary cases, for the bishop to insist on examining a clergyman who is already in orders, yet the power undoubtedly exists, and there may be very many cases in which the exercise of it would be proper.

[i] 14 Car. 2, c. 4. [k] 1 Burn's E. L. 145. [l] Rogers's E. L. 454.
[m] Vide *Attorney-General* v. *Wyscliffe*, 1 Ves. sen. 79; *R.* v. *Archbishop of Canterbury*, 15 East, 117.
[n] Gib. Cod. 826; Rogers's E. L. 455.
[o] 4 Inst. 338; but see 17 Vin. Abr. 330; Burn's E. L. 144.
[p] Rogers's E. L. 455.

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As to the second of the qualifications before-mentioned, that of learning, the bishop is to be the proper judge, so that "not sufficient," or not capable in learning to have the church, is a good plea on the part of the bishop, without setting forth in what kinds of learning, or in what degrees, the party presented to him was defective. For, by the statute *Articuli Cleri*,[q] which is a statute not merely enacting, but declaratory of the common law, it appears that, of the ability of a parson presented to a benefice of the church, the examination belongeth to the spiritual judge; so it hath been used heretofore, and shall be hereafter. And Lord Coke says, the bishop, in this examination, is a judge, and not a minister (that is, he has a judicial, not merely a ministerial office to perform), and may and ought to refuse a person presented, if he is not *idonea persona*."[r]

And as to the evident unfitness of a court of temporal jurisdiction to decide whether the bishop so refusing has acted properly, it was said by Lord Ellenborough, in alluding to a case decided,[s] "It was contended that he should state in what respects he was *minus sufficiens*, &c., because, in case of the death of the party, it could not be tried by the archbishop, but must be tried by the jury. It is so laid down certainly in the books; but a trial of that sort has never occurred in our times, nor is there any instance of it, that I am aware of, to be found in our books; and if such a case should happen, it does not occur to me how such a trial could conveniently proceed. Suppose a jury of twelve farmers, collected in the jury box, addressing themselves to try the literature of a departed person: how are they to set about it; are they to try it by evidence of his reputation for literature generally, or are they to try it by the particular documents, in proof of his literature, which he may have left in the shape of Latin or Greek exercises, produced upon his examination before the bishop, and upon which the bishop pronounced at the time when he refused to institute him? It would be somewhat strange to present to the grave attention of such a panel the translation which the deceased may have made from some parts of the sacred writings in the Greek tongue, or his Latin composition under a theme which may have been handed to him by the bishop; to hear counsel haranguing them upon topics of grammatical construction or verbal criticism, and to see them assisted by a judge (who possibly may not himself be very deeply learned in the dead

[q] 9 Edw. 2, st. 1, c. 13.
[r] 2 Inst. 631.
[s] *Hele* v. *Bishop of Exeter and others*, Show. P. C. 88.

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languages) addressing their minds, to try whether some learned bishop is right in the judgment he has formed upon the same materials, and sitting as a court of error from him upon matters of grammar. I wish that the law books, which tell us that it belongs to a judge and jury to decide such points, had at the same time instructed us how we are adequately to perform the task. As no case has been referred to as having yet happened, so I hope none will ever arise; for however well constituted we may be for other purposes, every body must see that a very imperfect and blind execution of duty must take place if the trial of literature were committed to such a tribunal."[t]

But, although it is thus established that no temporal court can enter into the question of the propriety of the bishop's refusal, yet the clerk or the patron have their remedy by appeal to the archbishop, and if he also refuses, then to the Judicial Committee of the Privy Council.[u]

Appeal from refusal by the bishop or ordinary.

If a man cannot speak such language as the parishioners understand, it is a good ground for refusal;[x] and it has been especially enacted,[y] that within the several dioceses of St. Asaph, Bangor, Llandaff and St. David's, the bishop may, if he think fit, refuse institution or license to any spiritual person who, after due examination and inquiry, shall be found unable to preach, administer the sacraments, perform other pastoral duties, and converse in the Welsh language. But an appeal to the Archbishop of Canterbury is given within one month after the refusal. It will be observed, however, that this enactment, like many others of those relating to church matters, only gives that power to the bishop which he clearly might have exercised though the act had not been passed, and thus has no other effect than to render it doubtful how far he may possess the power in cases not particularly specified.

Grounds of refusal.

The Welsh language.

With respect to the third qualification, that of behaviour, this too appears to be a matter entirely for ecclesiastical cognizance; little can be said of a question which must be entirely for the discretion of the ordinary; but it may be stated generally, that all such matters as would be good causes for deprivation, are *à fortiori* good causes for refusal. It may be here observed, that the holding another benefice is not a good cause of refusal, as the consequences

Behaviour, qualification as to.

Holding other benefice.

[t] See *R.* v. *Archbishop of Canterbury and Bishop of London*, 15 East, 143; the whole judgment in which case appears applicable to the present subject, although the case decided was somewhat different.

[u] Rogers's E. L. 460.

[x] Cro. Eliz. 119.

[y] 1 & 2 Vict. c. 106, s. 104.

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of accepting a second benefice are personal to the party presented.[z]

Time for considering of the sufficiency of the presentee.

The ordinary has twenty-eight days (formerly two months) to inquire and inform himself of the sufficiency of every clerk presented to him;[a] and if, within that time, he refuse to admit the clerk presented, and the presentor be a layman, the ordinary should give notice to the patron of such refusal; and if he neglects to give such notice no lapse is incurred, though no other clerk be presented; nor upon notice, unless it turn out upon trial that the clerk was properly refused. But if the clerk refused be the presentee of a bishop or other ecclesiastical person, the ordinary is not bound to give notice of the refusal; or if he should do it, such patron can never revoke or vary his presentation, by presenting another better qualified, without the consent of the ordinary; the law supposing him that is a spiritual person to be capable of choosing an able clerk.[b]

In case of refusal.

Distinction where the clerk is the presentee of a layman or of an ecclesiastic.

Necessity of giving notice in cases of an ecclesiastical patron considered.

This, however, does not appear to be quite satisfactory, because the ecclesiastical patron would have the same right of appeal as the layman; and therefore, as the decision of the ordinary in the first instance is not absolutely binding, the patron, whether an ecclesiastic or a layman, ought to have notice, in order that he may prosecute his appeal if he pleases; and it is presumed, therefore, that it must be doubtful whether, if the presentee of an ecclesiastic was refused and no notice given, any lapse would be incurred.

Appeal.

Where a refusal is appealed against, the dean of the arches, or other judge or judges of the court of appeal, sends a letter to the bishop so refusing, which letter or rescript is called *duplex querela*. By this proceeding the bishop is called on to show cause why, by reason of his neglect of doing justice, the right of institution is not devolved to the superior judge. The *duplex querela* should also contain an inhibition to the bishop that nothing be done pending the suit injurious to the party complaining. The clerk refused, having obtained this *duplex querela*, is to take care that some person, sufficiently learned for that purpose, do admonish the bishop to admit him and do him justice within the time mentioned in the *duplex querela*, and also, according to the contents thereof, to inhibit the bishop.

Duplex querela.

Mode of proceeding on a *duplex querela*.

The mode of proceeding upon a *duplex querela* is very fully entered into in Burn's Ecclesiastical Law; but it

[z] Gibs. Cod. 851.
[a] Canon 95.
[b] Wats. c. 12; Gibs. Cod. 836; Rogers's E. L. 460.

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does not appear necessary to mention all the proceedings which may in some cases be possible.

If the bishop does not appear to the citation, the right of instituting the presentee to the benefice is pronounced to have devolved to the superior judge; but in this case the clerk must be examined by the archbishop, and if approved of he brings his *fiat institutio* to the judge, who, however, before he institutes, it is said, is wont to require a bond of the presentee to save him harmless on that account. But if the bishop appears to the citation and alleges some cause why he refused the clerk, then the propriety of that cause is to be tried. If the cause alleged be not proved, the judge pronounces as before for his own jurisdiction, and the bishop is to be condemned in expenses; and so if he alleges an insufficient cause, as that the church is litigious, for this he ought to have tried.

If the bishop will not defend the suit the pretended incumbent may do it, and allege that the church is full of himself; and if the bishop will allow such incumbent to defend the suit, the judge cannot decree for his own jurisdiction until the cause is determined.[c]

Orders.

As to the last qualification, that of orders, it is directed that no bishop shall institute to any benefice one who has been ordained by any other bishop, except he first shows unto him his letters of orders, and brings him a sufficient testimony of his former life and good behaviour, if the bishop shall require it; and lastly, upon due examination, shall be worthy of his ministry.[d] For the circumstance that a clerk has been ordained or licensed by another bishop does not diminish the right which the statute gives the bishop to whom he is presented to examine and judge.[e]

Admission.

When the ordinary declares that he approves of the presentee as a fit person to serve the church to which he is presented, the clerk is said to be admitted.[f]

Institution.

The next formal step is the institution, or, as it is called sometimes in the older records, the investiture; for formerly the incumbent took his church by investiture of the patron. Institution by the ordinary was introduced about the time of Richard I. or John.[g]

What is to be done before institution.

Before actual institution takes place is the proper time for the clerk presented and admitted to take the prescribed oaths, and do such other acts as are made necessary by law for every person promoted to any ecclesiastial dignity, office or ministry. Such are the following:

[c] 1 Burn's E. L. 161; Wats. c. 21; 1 Ought. 237.
[d] Canon 39. [e] Gibs. Cod. 867. [f] Co. Litt. 244 a.
[g] Selden de Dec. 86, 375, 383; Burn's E. L. 8th ed. note, 164.

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Oath against simony.

1. To avoid the detestable sin of simony, every archbishop, bishop or other person having authority to admit, institute or collate to any spiritual or ecclesiastical function, dignity or benefice, shall, before every such admission, institution or collation, minister to every person to be admitted, instituted or collated, the oath against simony.[h]

Oath of allegiance and supremacy.

2. He must also take the oaths of allegiance and supremacy before such person as shall have authority to admit him.[i]

Oath of canonical obedience.

3. He must also take the oath of canonical obedience, as follows: "I, A. B., do swear that I will perform true and canonical obedience to the Bishop of C. and his successors in all things lawful and honest. So help me God."[k]

4. He must subscribe to the three following articles, which, unless he shall do, it is directed that no person, either by institution or collation, be admitted to any ecclesiatical living.

"That the king's majesty, under God, is the only supreme governor of this realm and of all other his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes as temporal; and that no foreign prince, person, prelate, state or potentate, hath or ought to have any jurisdiction, power, superiority, preeminence or authority, ecclesiastical or spiritual, within his majesty's said realms, dominions and countries.

"That the Book of Common Prayer and of ordering of Bishops, Priests and Deacons, containeth in it nothing contrary to the Word of God, and that it may lawfully be used, and that he himself will use the form in the said book prescribed, in public prayer and administration of the sacraments, and none other.

"That he alloweth the Book of Articles of Religion, agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in the convocation holden at London, A. D. 1562; and that he acknowledgeth all and every the articles therein contained, being in number nine and thirty, besides the ratification, to be agreeable to the Word of God."

To these three articles whosoever will subscribe, he shall, for the avoiding of all ambiguities, subscribe in this order and form of words, setting down both his christian and surname, viz. "I, N. N. do willingly and *ex animo* subscribe to these three articles above mentioned, and to all things that are contained in them." And if any bishop shall admit any, except he first have subscribed in manner and form aforesaid, he shall be suspended from giving

[h] Canon 40.
[i] 1 Eliz. c. 1; 1 Will. 3, c. 8, s. 5.
[k] Burn's E. L. 163; Gibs. 818.

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of orders and licenses to preach for the space of twelve months.[l]

5. He must further subscribe to the declaration of conformity in these words: "I, A. B. do declare that I will conform to the liturgy of the Church of England as it is now by law established."[m] Declaration of conformity.

Which declaration of conformity it is declared must be subscribed before the archbishop, bishop or ordinary of the diocese, or before the vicar-general, chancellor or commissary respectively, on pain that every person failing in such subscription shall lose and forfeit such respective promotion, and shall be utterly disabled and *ipso facto* deprived thereof, and the same shall be void as if such person so failing were naturally dead.[n]

All these requisite particulars having been complied with, actual institution or collation, as the case may be, may take place. This may be done either by the bishop personally or by his vicar-general, chancellor or commissary, to whom the clerk is sent by him for that purpose. But during the vacancy of a see, the right of institution belongs to the guardian of the spiritualties. And while any diocese or inferior jurisdiction is visited, the right belongs to the visitor. Institution or collation.

The form and manner of institution is thus: the clerk kneels before the ordinary whilst he reads the words of the institution out of a written instrument, drawn up for this purpose, with the episcopal seal appendant to it, which the clerk holds in his hand during the ceremony. Form of.

It is not necessary that the institution, much less the examination and admission, should be made by the ordinary within the diocese where the church is; the bishop may do it as well out of his diocese as within, for as to this matter it is not local, but follows the person of the bishop whithersoever he goes. Where made.

By a constitution of Archbishop Langton, no prelate shall extort any thing, or suffer any thing to be extorted by his officials or archdeacons, for institution or putting into possession, or for any writing concerning the same to be made. But generally, it is said by Dr. Burn, the ecclesiastical fees are regulated by the practice and custom of every diocese, according to a table confirmed by Archbishop Whitgift, and as is directed by the 135th canon. But it is enacted, that if any person shall for any reward, or promise of any reward, other than for lawful and usual fees, admit or institute to any benefice or any living ecclesiastical, he shall forfeit double the value of one year's Fees for.

[l] 1 Burn's E. L. 165. [m] 13 & 14 Car. 2, c. 4. [n] Ibid. s. 10.

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profit thereof, and the same shall be void as if such person were naturally dead.

Stamp duties.

But in addition to these ecclesiastical fees, there are certain stamp duties imposed on collation and institution, a table of which is to be found in the Appendix.[o]

A distinct and particular entry of institution should be made in the public register of the ordinary, and this entry should contain

What the entry should contain.

The name of the clerk instituted.

The date of the day and year on which the institution took place.

Whether a presentation or collation.

If the former, at whose presentation the clerk was instituted.

If the latter, then whether or not by lapse.[p]

Effects of institution.

After institution the church is full, and plenarty by six months is pleadable against all persons but the king, and even against him when he claims in right of a common person. But by collation the church is not full, nor is

Plenarty.

plenarty by collation pleadable; but the right patron may bring his writ and remove the collatee at any time; unless he be such patron as has also a right to collate; for against him plenarty by collation is pleadable; and the reason why collation does not make plenarty is, that then the bishop would be judge in his own cause, to the great prejudice of patrons; and therefore the bishop's collation, in this respect, is interpreted no more than a temporary provision for celebration of divine service until the patron present.[q]

Superinstitution.

A church being full by institution, if a second institution is granted to the same church, this is called a superinstitution. And superinstitution, as such, is properly triable in the Ecclesiastical Court, if there has been no induction upon the first institution, but not otherwise.[r] But the mode of trying a title by superinstitution is liable to so many inconveniences, that it has been discouraged, and is fallen into disuse.

Institution gives *jus ad rem*.

When a clerk has been instituted or collated, he acquires a *jus ad rem*, and he can enter on the glebe and take the tithes; but he has not yet so full a right in them, as would enable him to grant or sue for them if they were

Cure of souls.

withheld from him.[s] By institution also he becomes responsible for the cure of souls committed to him.[t]

[o] See Appendix.
[p] Gibs. 813; 1 Burn's E. L. 168.
[q] Wats. c. 12; Gibs. 813; 1 Burn's E. L. 171.
[r] Gibs. 813.
[s] Gibs. 813.
[t] Johns. 74.

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Section 3.

Of Simoniacal Presentations.

Simony, what it is.

Simony is the corrupt presentation of any one to an ecclesiastical benefice for gift, money or reward: and as it is to be considered as an offence against religion, by reason of the sacredness of the charge which is thus profanely bought and sold, we shall hereafter advert to it under that head, as it affects the parties guilty of it; in this place, however, we have only to consider its effect upon presentations which are affected with it. Simony was so called from the resemblance it is said to bear to the sin of Simon Magus; though the purchasing of holy orders seems to approach nearer to his offence.

By the canon law.

Simony by the canon law was considered as a very grievous crime, and as a sort of heresy, as we shall hereafter mention; and, as Lord Coke observes, is so much the more odious because it is ever accompanied by perjury, for the presentee is sworn to have committed no simony. And it should be here observed, that persons guilty of simony are by the canonists divided into two classes: 1st, *Simoniaci*—those who obtain spiritual preferment by corrupt and simoniacal contracts to which they are privy and consenting; and 2nd, *simoniacè promoti*—those who, though they come in by simony, are not parties or privies to it.[u]

Simoniaci.

Simoniacè promoti.

Stat. 31 Eliz. c. 6.

The ecclesiastical censures by which this crime was punishable were not found to be efficient to prevent the notorious practice of it, and the corrupt patron was altogether beyond their influence. A statute was therefore passed in the 31st year of Queen Elizabeth,[x] by which the offence of simony, in the various ways in which it might be committed, was defined; and as to simoniacal presentations it was declared that[y] if any person or body corporate, &c. shall or do, for or by reason of any promise, agreement, grant, bond, covenant or other assurances; or for money, reward, gift, profit or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend or living ecclesiastical; or give or bestow the same for or in respect of any such corrupt cause or consideration; such presentation, collation, gift and bestowing, and every admission, institution, investiture and induction thereupon shall be utterly void, frustrate and of none effect in law.

Penalties affixed to simony.

Presentations, &c. void.

[u] Degge, 14; Godolph. Abr. 538; Rogers's E. L. 837.
[x] Chap. 6. [y] Sect. 5.

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And it shall be lawful for the queen to present, or collate unto, or give or bestow every such benefice, dignity, prebend or living ecclesiastical, for the one time or turn only. And that every such person or body corporate, &c. that shall give or take any such money, reward, gift or benefit directly or indirectly; or that shall make any such promise, grant, bond, covenant or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, &c. And that the person so corruptly taking, procuring, seeking or accepting any such benefice, dignity, prebend or living, shall thereupon be adjudged a disabled person in law to enjoy the same benefice, &c.

Penalties on those guilty of it.

Whom they affect.

But if the presentee dies without being convicted of simony in his lifetime, it is enacted by statute 1 W. & M. c. 16, that the simoniacal contract shall not prejudice any other innocent patron or presentee, on pretence of lapse to the crown or otherwise.

Stat. 12 Anne, c. 12.

Clergymen may not purchase for themselves a next presentation.

In addition to the provisions of 31 Eliz., clergymen are expressly prohibited by the 12th of Anne, c. 12, from purchasing for themselves a next presentation or avoidance. That statute, reciting that some of the clergy have procured for themselves preferments by buying ecclesiastical livings, and others have been thereby discouraged, enacts, that if any person shall or do for any sum of money, reward, gift, profit or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant or other assurance, of or for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend or living ecclesiastical, and shall be presented and collated thereupon, such presentation or collation, and every admission, institution, investiture and induction upon the same, shall be utterly void, frustrate and of no effect in law; and such agreement shall be deemed a simoniacal contract, and the queen may present or collate unto, or give and bestow such benefice, &c. for that one time or turn only; and the person so corruptly taking, &c. shall thereupon be adjudged a disabled person in law to have and enjoy the said benefice, &c., and shall also be subject to any punishments, pain or penalty, limited, prescribed or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice, &c. had become vacant, any law or statute to the contrary notwithstanding. The effect of simony, as regards

Penalties for so doing.

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the presentor, the presentation and the presentee, is sufficiently clear upon these statutes. The questions which have arisen on them are what is and what is not simony; and that which we have now to consider is what is and what is not a simoniacal presentation.

What circumstances make a presentation simoniacal in law.

In order to do this, it may be well to consider such simony as of two kinds; and the first, where any gift, reward, profit or benefit is given, or promised or taken, directly or indirectly, for procuring a presentation to a benefice.

If the party or parties who present are to derive *any* benefit from their presentee, it is clearly simoniacal; which proposition, and the extent of it, may be very well illustrated by the following case,[z] of which the particulars are here inserted, as a test by which many other cases of a similar nature might be tried.

Where the party presenting is to derive a benefit from the presentee.

An agreement had been entered into in a parish in the following terms. At a meeting of the inhabitants of P. for the purpose of electing a resident curate or chaplain to the church of P., the Rev. I. P. was by the inhabitants appointed resident curate or chaplain, and to the possession of the parsonage house, and also to the money payment of 40*l.* 8*s.* 2*d.* annually, payable out of the lands and hereditaments in P. in right of the said curacy, together with the surplice fees, and all other profits, privileges and appurtenances to the same belonging and of right payable. And the inhabitants aforesaid, considering the present stipend or money payment of 40*l.* 8*s.* 2*d.*, with the surplice fees, of themselves insufficient for the proper support of such resident curate, have voluntarily consented and agreed with the said I. P., that upon his entering upon such curacy at Michaelmas next, and performing the usual duties of the church, &c., together with such weekly duty as hath been customary and may be required, they the said inhabitants will, by a rate to be made by the churchwardens of P. now and for the time being, or by some other means, raise and pay out of the lands and hereditaments in P., 29*l.* 11*s.* 10*d.*, in addition to the said money payments, &c. Provided, and it is hereby agreed, that the payment of the said 29*l.* 11*s.* 10*d.* shall be made and continued only upon the occupiers of lands and hereditaments in P. aforesaid, and shall not in any respect alter the money payment of 40*l.* 8*s.* 2*d.* wherewith the said lands and hereditaments are, and have been time immemorial, charged in right of the said church. And lastly, the said I. P. doth hereby consent and agree to

Example of the above rule.

[z] R. v. *Bishop of Oxford*, 7 East, 600.

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accept the said curacy or chaplainship, upon the terms hereinbefore mentioned. (Signed by I. P., and by the principal inhabitants and parish officers.)

The following facts were disclosed by an affidavit on the part of the bishop, showing why he considered this agreement as simoniacal, and had thereupon refused to license Mr. P. That in June 1801, when the meeting of the inhabitants of P. took place after the vacancy, the bishop was entirely ignorant of the rights of the curate, and was then informed that the salary was a fixed sum of 40*l.*, and inquiring how it was so settled, was referred by one of the parties to an act for the inclosure of the township of P. That the bishop, under such ignorance of the rights of the curate, expressed his approbation of raising the stipend to 70*l.* a year, as it was proposed to do; but upon reference afterwards to an inclosure act passed some time before, it was found to recite, that the chaplain or curate of P. was entitled either to the small tithes, or else to a modus or composition of 18*s.* for every yard land, and so in proportion, in lieu of all tithing whatsoever; and it provides, that nothing in the act contained shall extend to establish or annul, or to strengthen or to weaken, in anywise the right or claim which the curate of P. had or might have to any small tithes, or to determine or imply that he was or was not entitled to the same. And on subsequent inquiry, it appeared that by the endowment of P. in 1428, the curate was entitled to all the small tithes; in consequence of which the rights of the curate had been reserved by the act of parliament: that in the survey returned into the Exchequer at the time of Queen Anne, the curacy was valued at 41*l.* 7*s.* 8*d.*, and the small tithes were now estimated at above 130*l.* per annum; and that the vicarage of the parish of A., which was then returned at 42*l.* 5*s.* 3*d.*, is now reputed to be worth 200*l.* per annum: that Mr. S., the other candidate with Mr. P., refused to sign the agreement in question, as simoniacal, in agreeing to accept 70*l.* per annum in lieu of small tithes; in consequence of which refusal, the inhabitants nominated Mr. P. without opposition: that the inhabitants afterwards offered to give up the agreement, proposing, however, that Mr. P. should be bound in honour by it; to which the bishop gave his positive negative, and said that he felt it his duty not to license any person who was not perfectly free to assert his rights: that in consequence of this agreement, the nomination having been simoniacal and void, the right of nomination vested in the king, who on the 1st of July, 1803, nomi-

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nated another party, to whom the bishop granted his license accordingly.

The sole question in the case was, whether such an agreement was simoniacal and void; and Lord Ellenborough said, "*This, I am clearly of opinion, was simoniacal: if a presentee do but bargain with his patron to forbear any suit for the purpose of trying whether or not by law he be entitled to small tithes, that* is an agreement for a *benefit* within the statute, and *amounts to simony.*"

What consideration is simoniacal.

So if a patron promises a clerk, that in consideration of his marrying his daughter or kinswoman, he will present him to a living when void, this is a simoniacal contract.[a]

But where A. covenanted that B. his son should marry C. the daughter of D., in consideration of which D. covenanted to advance 300*l.* for his daughter's portion, and A. covenanted to settle certain lands on his son and his intended wife, and there were likewise covenants on the part of A. for the value of the lands and for quiet enjoyment, and a covenant on the part of D. to procure a certain benefice for B. on the next avoidance, it was held that this was not a corrupt contract, it not being a covenant in consideration of the marriage, but a distinct and independant covenant, without any apparent consideration.[b]

It has been said that a reservation of a benefit to a stranger, as an annuity to the widow and son of a late incumbent, does not appear to be within the statute 31 Eliz.;[c] but this proposition is doubted by Watson; and so it is laid down by Blackstone, that bonds given to pay money to charitable uses, on receiving a presentation to a living, are not simoniacal, provided the patron or his relations are not benefited thereby, for that this is no corrupt consideration moving to the patron.[d] But though this might perhaps have been so previously to the statute 1st of Anne before mentioned, it is submitted, that it is now clear that it matters not to whom, or for what the money may be paid; but that if any such money is paid by the presentee, in order to obtain his presentation, such presentation is simoniacal under the last mentioned statute.

Simoniaci and *simoniacè promoti.*

We now come to the distinction of the canon law, to which we have before adverted, between *simoniaci* and *simoniacè promoti;* and in either case it appears that under the statute of Elizabeth the presentation is equally simoniacal and void. Thus it was resolved by all the judges in 8 Jac. I. that if any should receive or take money, fee, reward or other profit for any presentation to a benefice

If a presentee be innocently *simoniacè promotus*, the pre-

[a] Wats. 37; Cru. Dig. tit. xxi. c. 11. [b] *Byrte* v. *Manning*, Cro. Car. 190. [c] *Baker* v. *Mounford*, Noy, 142. [d] Black. Com. b. 11, c. 18; Stra. 534.

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sentation is nevertheless void.

with cure, although in truth he which is presented be not knowing of it, yet the presentation, admission and induction are void by the express words of the statute 31 Eliz., and the king shall have the presentation *hâc vice*; for the statute intends to inflict punishment upon the patron as upon the author of this corruption by the loss of his presentation, and upon the incumbent who came in by such a corrupt patron by the loss of his incumbency, although he may not have known of it; but if the presentee be not cognizant of the corruption, then he shall not be within the clause of disability in the same statute.[e]

But such presentee does not incur disability under the statute.

In a writ of error to reverse a judgment whereby the king had recovered upon a title of simony, which was that a friend of the clerk had agreed to give a sum of money to J. S., who was not the patron, to procure the clerk to be presented to a church, who was presented accordingly, it was assigned for error that it did not appear that either patron or clerk was acquainted with the agreement; but the court said that the clerk was *simoniacè promotus*. And it was said that Dr. Duxon had enjoyed the church of St. Clement above twenty years by such a title of the king's, the presentee of the patron being ousted by reason of a friend having given money to a page of the Earl of Exeter to endeavour to procure the presentation, and neither the earl nor the clerk knew any thing of it.[f]

But a clergyman *simoniacè promotus* is not liable to any punishment in a proceeding in the Ecclesiastical Court.

A clergyman therefore who is *simoniacè promotus*, is equally affected under the statute of Elizabeth as one who is actually *simoniacus*. But though the statute may thus render the title of the clerk invalid, and it may consequently be loosely said by some writers that the presentee is thereby punished, the use of such a term will not render him liable to a criminal proceeding by articles for his soul's health. Such is not the sort of suit to be brought for that purpose; and in such a suit it was said by Sir J. Nicholl, "The suit in this form ought not to have been brought against the defendant; no authority can be found which establishes such a principle that in a criminal suit a party can be punished for a crime of which he is not guilty; nor is there any such instance since the statute of Elizabeth against a person *simoniacè promotus*. The proper proceeding is under the statute upon a *quare impedit*. Even if proved to have been *simoniacè promotus*, he has been guilty of no crime for which this court could punish him, assuming that his possession were invalid under the statute."[g]

[e] *Hutchinson's case*, 12 Rep. 101; Cruise, Dig. tit. xxi. c. 11.
[f] *Rex* v. *Trussel*, 1 Sid. 329; 2 Keb. 904.
[g] *Whish and Wollet* v. *Hesse*, 3 Hagg. 659.

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Sale of presentation during a vacancy is simony.

The second kind of simoniacal presentation is where the right to present is sold at the time when the church is vacant; and this was also held to be void at common law, because during the vacancy of the church the right of presenting was but a *chose in action*, which could not be transferred.

A patron of an advowson, the church being void, granted to B. *proximam presentationem* to the said church, *jam vacantem, ita quod liceat* B. *hâc vice ad dictam ecclesiam presentare;* and it was resolved by all the judges of England that the grant was void, for the present avoidance was a thing in action and privity, and vested in the person of the grantor.[h]

Grant of an advowson during a vacancy is void as to the next presentation.

A lease of an advowson, granted after the church became vacant, was adjudged void *as to the immediate presentation.* And it is said by Lord Hardwicke that the sale of an advowson during a vacancy was not within the statute of simony as a sale of the next presentation was, but was void by the common law. And the Court of King's Bench resolved that a grant of a next presentation, or of an advowson, made after the church was actually fallen vacant, was a void grant *quoad* the fallen vacancy. Lord Mansfield and Mr. Justice Wilmot said, the true reason why a grant of a fallen presentation of an advowson, after avoidance, is not good, *quoad* the fallen vacancy, is the public utility, and the better to guard against simony, not for the fictitious reason of its being a *chose in action.* And it was held in the same case that a grant of a presentation, after institution of the incumbent to a second living which vacated the first, was void, because the church was considered as vacant from the time of institution.[i]

But as to the next presentation only, and the grant on conveyance may stand good as to the remainder.

Bearing in mind this reason why the grant of a vacant presentation is void, it will be seen that a grant of the advowson, except as to the next presentation, would always remain unaffected, since the same reason would not apply to such a case; and therefore if an advowson be sold, the church being at that time actually vacant, the sound part of the transaction may sometimes be separated from the corrupt; that is, it may be treated as the sale of an advowson, except as to the presentation then to be made, which belongs neither to the vendor nor purchaser, but which the crown takes by forfeiture. The right to convey or grant the advowson, and the rights of the grantees, are the same as if no simony had taken place, the forfeiture being paid under the statute, and the conveyance stand-

[h] *Stephens* v. *Wall*, Dyer, 282 b.
[i] *Bishop of Lincoln* v. *Wolferstan*, 1 Black. R. 490; Cruise, Dig. tit. xxi. c. 11.

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ing good for the remainder. And in a case where this question arose, it was said by Sir Vicary Gibbs, C. J.: "The statutes against simony apply only to the presentation corruptly procured or intended to be procured; and the offence of simony at the common law (admitting it to have been an offence) can be carried no further. The presentation thus corruptly procured or trafficked for, is forfeited to the crown, and certain penalties and disabilities are inflicted on the offenders. The statutes contain no express provision for avoiding simoniacal conveyances; but there can be no doubt that the conveyance, even of an advowson in fee, which in itself is legal if it be made for the purpose of carrying a simoniacal contract into execution, is void as to so much as goes to effect that purpose; and if the sound part cannot be separated from the corrupt, is void altogether. It is not, as in the case of usury and some others, avoided by the positive and inflexible enactment of the statute, but left to the operation of the common law, which will reject the illegal part and leave the rest untouched, if they can fairly be separated. In this case the conveyance made in furtherance of the simoniacal stipulations has been treated as ineffectual, but the remaining interest which passes by it stands clear of this objection, and may, as we think, be fairly separated from the objectionable part. It is true that by the contract one entire consideration is to be paid for the whole advowson, and we cannot say how much should be referred to the legal and how much to the illegal part of the transaction; but we are sure that our decision supports so much only of the conveyance as applies to the legal part; the rest has been dealt with as illegal, the crown has taken the forfeiture." [k]

When church is full, next presentation may be purchased;

Where a person purchased the next presentation to a benefice, the church being then full, with an intention to present a particular person, a subsequent presentation of that person was formerly deemed simony. But it is now an universal practice to purchase the next presentation to a living, the church being full; and there is no modern instance where a presentation under such circumstances has been questioned.[l] But this statement must be taken with the qualification that the party purchasing must not be a clergyman purchasing for himself.

but not by a clergyman for himself.

Sale of advowson or presentation where incumbent is *in extremis*.

It was formerly doubted whether, if an advowson or next presentation to a church was purchased when the incumbent was in a dying state, the next presentation in either

[k] *Greenwood* v. *Bishop of London*, 5 Taunt. 727.
[l] Cruise, Dig. tit. xxi. c. 11.

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case would be simoniacal: and first, it was decided and settled that if an advowson were purchased under such circumstances, the next presentation in right of it would not, under the circumstances, be simony.

A person having notice that the incumbent was on his death-bed, and would not live over the night, purchased the advowson in fee of the defendant: the incumbent died the next day, and the purchaser presented his clerk upon that avoidance. A question was referred by the Court of Chancery to the Court of Common Pleas, whether the said presentation was void, as being on a simoniacal contract.[m] Lord Chief Justice De Grey said, he was not able to doubt upon the question. An advowson was a temporal right; not indeed *jus habendi*, but *jus disponendi*. The exercise of that right was by presentation. The right itself was a valuable right, and properly the object of sale: but the exercise of this right was a public trust, therefore ought to be void of any pecuniary consideration, either in the patron or the presentee. Simony was unknown to the common law, though corrupt presentation was. But what was or was not simony depended on the statute of 31 Eliz., which did not adopt all the wild notions of the canon law, but had defined it to be a corrupt agreement to present. No conveyance of an advowson could be affected by that act, unless so far as it affected the immediate presentation; therefore a sale of an advowson, the church being actually void, was simoniacal and void in respect to the then present vacancy. But it had never been thought that to purchase an advowson merely with the prospect, however probable, that the church would soon become void, was either corrupt or simoniacal;[n] though by the common law, if a clerk or a stranger, with the privity of a clerk, contracted for the next avoidance, the incumbent being *in extremis*, it was held to be simoniacal. The present case was the purchase of an advowson in fee. No privity of the clerk appeared. The church was not actually void, but in great probability of a vacancy; which, however, was by no means equivalent to a certainty. He said the judges would go beyond every resolution of their predecessors to determine this to be simony.

Simony not dependant on the canon law, but on statute.

The other judges concurred; and the court certified that the presentation was not void, it not appearing to them to have been made upon a simoniacal contract.[o]

Sale of advowson, where incumbent is *in extremis*, declared not simoniacal.

[m] *Barrett* v. *Glubb*, 2 Black. Rep. 1052.
[n] See *Greenwood* v. *Bishop of London*, 5 Taunt. 727.
[o] *Barrett* v. *Glubb*, 2 Black. Rep. 1052.

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Sale of next presentation under similar circumstances formerly held void.

Still, however, it was long afterwards considered that a contract for sale of a next presentation, the parties knowing the incumbent to be at the point of death, was simoniacal, and indeed such an opinion might be collected from the judgment in the case last mentioned. And in the case of *Fox* v. *Bishop of Chester*,[p] it was, after full argument, decided, that a presentation made in pursuance of such a contract was void, although the clerk was not privy to the transaction, and the contract was not made with a view to the presentation of any particular individual; for that vacancy was not made by any words of the statute essential to a corrupt contract, and that a contract might be corrupt, although the church were full. But this case was afterwards brought by error into the House of Lords, and this judgment of the King's Bench was there overruled: Best, C. J., who delivered the unanimous opinion of the judges of the Common Pleas and Exchequer, said, "If this conveyance were void, it must have been so when executed, and would remain void, into whatever hands and under whatever circumstances the right of presentation might have passed. Now, if this incumbent had been restored to apparent health, (as many persons thought to have been in imminent danger of death have been,) and the vendee had sold the presentation to one ignorant of the circumstances under which the first sale was made, it would be most unjust to hold this second sale void; and yet this would be the necessary consequence of holding that the first sale was simoniacal. Whilst the law, therefore, permits the next presentation of livings to be sold during the lives of the incumbents, as long as the incumbent is alive, the sale is good. It would be difficult to establish a rule that should settle what degree of probability of the approaching death of an incumbent would prevent the sale of the next avoidance of a benefice, and more difficult to ascertain by evidence when an incumbent was within that rule."[q]

But now declared good, and not simoniacal.

A sale, with an agreement for a speedy resignation, is simoniacal.

But it is presumed that that part of Chief Justice Abbott's judgment, in *Fox* v. *Bishop of Chester*, is still good and acknowledged law, in which he says, "No person would doubt but that a sale of the next presentation for money, accompanied by an agreement for an immediate or speedy resignation, would be within the statute."

So if the church is filled wrongfully, and an action pending for removing the clerk.

And so if a presentation be made by a person usurping the right of patronage; and, pending an action for removing his clerk, who is afterwards removed, the benefice is sold; this is an offence within the meaning of the statute,

[p] 2 Barn. & Cress. 635. [q] Same case on appeal, 6 Bing. 20.

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for the church was never full of that clerk. And if this were allowed, the statute might be evaded; for it would be only getting an usurper to present while the church was void, and then selling it.[r]

And so after the institution of incumbent to a second living.

And so also it has been held, that a grant of a presentation, after institution of the incumbent to a second living, which vacated the first, was void, because the church was considered as vacant from the time of institution.

Formerly it was doubted whether it was simony for a clerk to purchase for himself the next presentation to a benefice while it was full, and to be presented to it when it became void; but this doubt has been entirely removed, and the simony of such a transaction clearly established, by the statute of 12 Anne before mentioned.[s]

A clergyman may purchase for himself an advowson in fee, and be presented upon the next vacancy.

But it has been further doubted whether the purchase of an advowson in fee by a clergyman, and a presentation of himself upon the death of the incumbent, be within this statute. It appears, from an opinion of the late Mr. Fearne,[t] that he did not consider such a purchase as prohibited by that statute, but that a presentation by a trustee of such a purchaser, of the purchaser himself, might be made. This opinion is supported by Lord Chief Justice De Grey's argument in the case of *Barrett* v. *Glubb*, in which he distinguished between a purchase of the next presentation to a church, and a purchase of an advowson in fee; for, in the first case, he admitted that a purchase would be simoniacal, if the incumbent was *in extremis;* whereas in the second case he held it good.[u]

Result of the authorities.

The result of these authorities is, that the law is now settled as follows.

Present state of the law. What is not simony.

It is not simony for a layman, or spiritual person not purchasing for himself, to purchase while the church is full either an advowson or next presentation, however immediate may be the prospect of a vacancy; unless that vacancy is to be occasioned by some agreement or arrangement between the parties.

Nor is it simony for a spiritual person to purchase for himself an *advowson*, although under similar circumstances.

If either a layman or spiritual person purchase an advowson while the church is vacant, a presentation by the purchaser upon any future avoidance, after the church has been filled for that time, is not simony.

What is simony.

It is simony for any person to purchase the next presentation while the church is vacant.

[r] *Walker* v. *Hammersley*, Skin. 90.
[s] Cruise, Dig. tit. xxi. c. 2.
[t] Cases and Opinions, 409.
[u] See ante.

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It is simony for a spiritual person to purchase for himself the next presentation, although the church be full.

It is simony for any person to purchase a next presentation, or if the purchase be of an advowson, the next presentation by a purchaser would be simoniacal, if there is any agreement or arrangement between the parties at the time of the purchase for causing a vacancy to be made.

If any person purchase an advowson while the church is vacant, a presentation by the purchaser for that vacancy is simony.

Section 4.

Of Induction.

Induction.

We speak of induction under a separate head, since it is entirely of a different nature from those other steps which we have mentioned, by means of which the incumbent obtains full possession of his benefice.

Origin of.

Formerly it was considered that no person could have full possession of a corporal hereditament without some act of this nature. Thus in the case of a feoffment by which lands were conveyed, livery of seisin, as it was called, or the delivery of possession, was held absolutely necessary to complete the donation. "*Nam feudum sine investiturâ nullo modo constitui potuit.*" And an estate was then only perfect, when, as the author of Fleta expresses it, "*Fit juris et seisinæ conjunctio.*" [y]

Investitures

Investitures, in their original rise, were probably intended to demonstrate, in conquered countries, the actual possession of the lord; and that he did not grant a bare litigious right, which the soldier was ill qualified to prosecute, but a peaceable and firm possession. And at a time when writing was seldom practised, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate, and that such as claimed title by other means, might know against whom to bring their actions.[z]

were the immediate origin of induction.

In all well governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain the property of lands. In the Roman law, *plenum*

[y] 2 Black. Com. 311. [z] Ibid.

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dominium was not said to subsist, unless where a man had both the right and the corporal possession; which possession could not be acquired without both an actual intention to possess, and an actual seisin, or entry into the premises, or part of them, in the name of the whole. And thus, in ecclesiastical promotions, where the freehold passes to the person promoted, corporal possession is required at this day to vest the property completely in the new proprietor. Therefore in dignities possession is given by instalment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution.[a]

Induction is therefore the *investiture* of the temporal part of the benefice, and when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata, parson imparsonee*, for as by institution or collation the spiritual cares of the parish and the cure of souls is committed to him, so by induction are committed to him the temporalties of the church, and actual possession of the church and glebe.[b] By institution also we have already seen that he had acquired *jus ad rem*, or *inchoate* and imperfect right to the temporalties, so that though he had a right to take the tithes, &c. he had no right to sue for them: by induction he acquires *jus in re*, or complete and full right, so that he would have a right to take the tithes, &c. and to sue for them if withheld; and he has now the real and corporal possession of the church, with all its rights, profits, and appurtenances thereto belonging.[c] By induction the parson is put in possession of a part for the whole, and may therefore maintain an action for a trespass on the glebe land, though he had not taken actual possession of it.[d]

Induction gives complete possession of the temporalties.

Where the party inducted has a former benefice, the avoidance of it does not take place until the induction to the second, so that lapse does not accrue until after that time, yet the patron of the former benefice may, if he pleases, present upon the institution of the clerk to the second benefice, and before his induction, and such presentation would be good.[e]

Effects of.

Although a suit in the ecclesiastical court is proper to try the validity of a parson's institution, yet if the parson

[a] 2 Black. Com. 312. [b] 3 Phill. 75.
[c] Gibs. 814; 1 Burn's E. L.
[d] *Bulwer* v. *Bulwer*, 2 B. & Ald. 470.
[e] *Wolfasten* v. *Bishop of Lincoln and Whitehead*, 2 Wils. R. 174.

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has been inducted, a prohibition would be granted, for, by induction, the parson has the church as a lay fee; and therefore the common law should be preferred to the spiritual law, and shall draw the trial of the whole to it. If there be a suit in the spiritual court before induction to repeal the institution, no prohibition will be granted; but induction, though it be after utterly void, yet, inasmuch as it is a temporal thing, it cannot be frustrated by the spiritual court. So, if the question be parson or not parson, which comprehends induction, it is only triable by the common law.

By whom it is to be made.

The archdeacon is the person who, of common right, has power to induct, but others may make inductions by prescription, as the deans and chapters of St. Paul's and Lichfield. The archdeacon usually issues a precept to other clergymen to perform the induction for him; and if he make a general mandate to all parsons, vicars, &c. within the archdeaconry, and a minister not resident within the archdeaconry make the induction, yet it is good.[g] And if the archdeacon refuse to induct after institution, an action on the case will lie against him, because it is a temporal act. And a mandamus will be granted to compel him; nevertheless such refusal is also punishable by ecclesiastical censures.[h]

If a church is exempt from archidiaconal jurisdiction, as many churches are, then the mandate is to be directed to the chancellor or commissary: if a peculiar, then to the judge of the peculiar. When an archbishop collates by lapse, or when a see is vacant, the mandate goes not to the officer of the archbishop, but to the officer of the bishop.[i]

If a bishop die or is removed after institution, but before induction is complete, the archbishop may grant a mandate of induction, the archbishop being guardian of the temporalties, *sede vacante;* so also, if the authority of the bishop be suspended, as by visitation, or if such mandate be not executed till after a new bishop has been confirmed, who then has power himself to execute it, yet it is not void, although it may be voidable.[k]

In case of grantee of a free chapel.

Other cases.

The king's grantee of a free chapel is to be put into possession by the sheriff of the county, and not by the ordinary. In some places a prebendary shall have possession without induction, as at Westminster, where the king makes his collation by letters patent, and thereupon the

[g] Rogers's E. L., Incumbent; Godolph. Abr. 278; Gibs. 860.
[h] Gibs. 815; *Sherock* v. *Boucher*, 1 Ld. Raymond, 88.
[i] 1 Burn's E. L. [k] Ibid.

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party enters without induction. Sometimes the bishop makes induction, and sometimes others, according to the usage of the place. The possession of sinecures is to be obtained in the same manner as other benefices.[l]

Where the bishop's mandate is general.

After institution the bishop issues his mandate, usually directed to the archdeacon, or, as it may be, to other persons having power to induct, directing them to induct the clerk who has been instituted; and the clergyman having obtained this mandate of induction, is to take it to the proper office, for the purpose of procuring the archdeacon's mandate, directed to all and singular rectors, vicars, &c. in order to obtain induction. But if the bishop's mandate is directed in general to all and singular rectors, vicars, &c., any clergyman in the diocese may induct by virtue of that mandate, without any application to the archdeacon's office.[m]

Mode of induction.

The person empowered to induct, taking the hand of the person to be inducted, lays it on the key of the church in the church door, or on the ring of the door; or if the church be ruinated, it is done by laying his hand on the wall or the fence of the churchyard, and saying, "By virtue of this mandate, I induct you into the real, actual, and corporal possession of the church of ——, with all its fruits, members, and appurtenances." He then opens the door and puts the new incumbent into possession of the church, who, when he has tolled the bell, comes forth, and the inductor indorses and signs a certificate of such induction on the mandate, attested by those who witnessed the same.[n] And this is said by Blackstone to be a form required by law, with intent to give all the parishioners due notice and sufficient certainty of their new minister, to whom their tithes are to be paid.[o]

Section 5.

Of Requisites after Induction.

Acts to be done after induction.

Although the clerk inducted thereupon becomes a complete incumbent, and has full possession of the temporalties as well as the spiritualties of his benefice, there are yet some further acts which the law requires him to perform, and to the non-performance of which penalties are attached.

[l] Wats. c. 15; Godolph. Abr. 279; Gibs. 860; Rogers's E. L., Incumbent.
[m] Hodgson's Instructions, p. 30; and 1 Com. 391.
[n] Cruise's Dig. tit. xxi. c. 2; Hodg. Instruct. 30. For form of certificate, see Appendix.
[o] 1 Com. 391.

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Reading in.

Every person who shall be presented or collated, or put into any ecclesiastical benefice or promotion, shall, in the church, chapel or place of public worship belonging to his said benefice or promotion, within two months next after that he shall be in the actual possession of the said ecclesiastical benefice or promotion, upon some Lord's day, openly, publicly and solemnly read the morning and evening prayers, appointed to be read by and according to the Book of Common Prayer, at the times thereby appointed or to be appointed; and after such reading thereof, shall openly and publicly, before the congregation there assembled, declare his unfeigned assent and consent to the use of all things therein contained and prescribed, in these words and no other:—"I, A. B., do here declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book intituled 'The Book of Common Prayer, and Administration of the Sacraments, and other Rights and Ceremonies of the Church, according to the use of the Church of England,' together with the Psalter or Psalms of David, appointed as they are to be sung or said in churches, and the form or manner of making, ordaining and consecrating of bishops, priests and deacons."[p]

Penalty for omitting or refusing.

And every such person who shall (without some lawful impediment, to be allowed and approved by the ordinary of the place,) neglect or refuse to do the same within the time aforesaid (or, in the case of such impediment, within one month after such impediment is removed), shall, *ipso facto*, be deprived[q] of all his said ecclesiastical benefices and promotions; and from thenceforth it shall be lawful for all patrons and donors of all and singular the said ecclesiastical benefices and promotions, according to their respective rights and titles, to present or collate to the same, as though the person or persons so offending or neglecting were dead.[r]

Reading the articles.

Every person admitted to any benefice with cure, shall publicly read the articles of religion agreed upon in convocation in the year 1562, in the parish church of that benefice, with declaration of his unfeigned assent to the same; and every person admitted to a benefice with cure, except that within two months after his induction, he do publicly read the said articles, in the same church whereof he shall have cure, in the time of common prayer there, with declaration of his unfeigned assent thereunto, shall be upon every such default, *ipso facto*, immediately de-

Penalty for omitting.

[p] 13 & 14 Car. 2, c. 4, s. 6.
[q] See Deprivation and Lapse.
[r] 1 Burn's E. L.; 13 & 14 Car. 2, c. 4.

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prived; provided, that no title to confer or present by lapse shall accrue upon any deprivation *ipso facto*, but after six months after notice of such deprivation given by the ordinary to the patron.[s]

Reading the certificate of his subscription to the declaration of conformity.

He shall publicly and openly read the ordinary's certificate of his having subscribed the declaration of conformity to the liturgy of the Church of England, as it is now by law established, together with the same declaration or acknowledgment, upon some Lord's day, within three months next after such subscription, in his parish church where he is to officiate, in the presence of the congregation there assembled, in the time of divine service, upon pain that every person failing therein, without some lawful impediment, to be allowed and approved by the ordinary of the place, shall lose such parsonage, vicarage or benefice, curate's place, or lecturer's place respectively, and shall be utterly disabled and *ipso facto* deprived of the same; and the said parsonage, vicarage or benefice, curate's place or lecturer's place, shall be void as if he was naturally dead.[t]

Penalty for omitting.

Necessity for repeating the declaration of conformity.

A doubt has been raised, whether the design of the act was, that the clerk should only read the bishop's certificate to the congregation, in testimony of his having subscribed the declaration before him, or whether, after having read the certificate, he should not also make the same declaration again in form before the congregation, which point has never been judicially determined; but the latter opinion is not only more safe, but has also been thought more agreeable to the tenor of the act than the bare reading of the certificate.[u]

Deprivation in such cases is *ipso facto*.

Upon these statutes it is to be observed, that the deprivation is to be, *ipso facto*, upon the neglect or default, so that no declaratory sentence of deprivation would be necessary; for, as it has been observed, if it were so, the statute would be defrauded at the pleasure of the ordinary if he would not deprive; and this, it is said,[x] is the received interpretation of the statutes, although in a very old case[y] the contrary seems to have been supposed. And although the necessity of notice being given to the patron by the bishop, and the provision as to lapse is mentioned only in the second statute, yet it seems as to that, that it is to be the same under the others, and that lapse accrues in neither case by such deprivation until six months after such notice given.[z]

[s] 13 Eliz. c. 12, s. 3.
[t] 13 & 14 Car. 2, c. 4, s. 11. [u] Gibs. 817; 1 Burn's E. L. Benefice.
[x] Ibid. [y] *Bacon* v. *Bishop of Carlisle*, 1 Burn's E. L. 180.
[z] See Deprivation and Lapse.

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Usual time of reading in.

Although the different times of one month, two months, and three months, are mentioned in these statutes as the times within which each declaration respectively is to be read, they are usually read on the same Sunday, and constitute what is termed "reading in."

How the months are to be computed.

The months in this case are not to be reckoned according to the ecclesiastical computation, and as calendar months, but as months of twenty-eight days only; for in an old case, mentioned in Burn's Ecclesiastical Law, where the induction was September 15th, and the articles were read November 15th, this was adjudged insufficient. That case, however, scarcely appears sufficient to prove the point for which it is there cited; for the reading of the articles in that case could not be said to be within the two months, even if the months were reckoned according to the calendar; for where the computation is to be made from or after an act done, the day of doing the act is to be included.

The omission is cured in certain cases by reading in at any time.

From the case last mentioned, and from the words of the statutes, it would have followed, that if neglect or default had been made in reading in within the proper time, it could not have been cured by reading in after that time; but by the statute 33 Geo. II. c. 28, it is enacted, that whereas it hath happened, and may happen, through sickness or other lawful impediment, that divers persons have been and may be hindered from reading the said articles, and making the said declaration, within the two months; and yet such person, after such sickness or other lawful impediment removed, hath read or may read the said articles, and hath made or shall make the said declaration, and it is resonable that such persons shall be deemed to have complied with the true intent and meaning of the said act; every person who hath read or shall read the said articles, and hath made or shall make the said declaration, at the same time that he did read or shall read the morning and evening prayer, and declare his unfeigned assent and consent thereunto, according to the form in 13 & 14 Car. II. c. 4, s. 6, shall be and is hereby declared and adjudged to have complied with the true intent and meaning of the said act of the 13 Eliz., although the same were not or may not be read within the space of two months after such person's induction into any benefice with cure; and every such person shall be freed and discharged from any deprivation or other forfeiture by virtue of the said act.

Certificate of reading in should be obtained.

It is prudent to obtain from the churchwardens, or some other inhabitants of the parish, a certificate that the

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new incumbent has complied with the above forms, which are required to be observed in the church; a printed form of which certificate, as here set forth, is usually supplied by the bishop's secretary at the time of institution or collation.[a]

Form of the certificate.

Memorandum.—That on Sunday, the —— day of ——, in the year of our Lord one thousand eight hundred and ——, A. B., rector (or vicar) of the rectory (or vicarage) of the parish church of ——, in the county of —— and diocese of, did read, in his parish church of ——, aforesaid, the articles of religion, commonly called the Thirty-Nine Articles, agreed upon in convocation in the year of our Lord 1562, and did declare his unfeigned assent and consent thereto: also that he did publicly and openly, on the day and year aforesaid, in the time of divine service, read a declaration in the following words, viz.: "I, A. B., do declare that I will conform to the Liturgy of the United Church of England and Ireland, as it is now by law established;" together with a certificate, under the hand of the right reverend ——, by Divine permission lord bishop of ——, of his having made and subscribed the same before him: and also that the said A. B. did read, in his parish church aforesaid, publicly and solemnly, the morning and evening prayer, according to the form prescribed in and by the book entitled the Book of Common Prayer, and Administration of the Sacraments, and other Rites and Ceremonies of the Church, according to the use of the united Church of England and Ireland; together with the Psalter or Psalms of David, pointed as they are to be said or sung in churches, and the form and manner of making, ordaining, and consecrating bishops, priests and deacons; and that, immediately after reading the evening service, the said A. B. did openly and publicly, before the congregation there assembled, declare his unfeigned assent and consent to all things therein contained and prescribed, in these words, viz.: "I, A. B., do declare my unfeigned assent and consent to all and every thing contained and prescribed in and by the book intituled the Book of Common Prayer and administration of the Sacraments, and other rites and ceremonies of the Church, according to the use of the united Church of England and Ireland; together with the Psalter or Psalms of David, pointed as they are to be sung or said in churches, and the form and manner of making, ordaining and consecrating bishops, priests and deacons: and these things we promise to testify upon our corporal oaths, if at any time we should be duly called thereto.

[a] Hodgson's Instructions.

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In witness whereof we have hereunto set our hands, the day and year first above written.[b]

C. D. G. H.
E. F. I. K.

Use of preserving evidence that the requisites after induction have been complied with.

We have said that it is prudent for the incumbent to obtain the above certificate; and it will have been observed, also, that, in the other requisites to be observed on admission and institution, some entry or certificate is always directed to be made, in order that evidence may be preserved that all the requisites have been complied with, if, in the case of suits or actions brought by the incumbent, his title should be disputed. And it seems to have been formerly doubted whether in such cases it was not necessary for the incumbent to prove his title, by proving his admission, institution, induction, and reading the articles, &c.; and it was said in an old case, that although at law they hold the parson to proof of these things, yet they never do it in equity.[c]

What is *primâ facie* evidence that requisites have been complied with.

It has been held, however, that fifteen years' possession is *primâ facie* evidence of a regular induction to a benefice, and of having read the Thirty-nine Articles;[d] but it seems, without any length of possession, regular induction, with all its after requisites, will be presumed. Nor need these be proved, in any case, in the first instance; but if, upon examination of the registers, a suspicion be induced that such requisites have not been complied with, it may be fit for a jury to take it into consideration.[e] And that this is the law appears to be completely and fully established by the following case.

It will be presumed that the requisites have been complied with, unless some evidence is given to the contrary.

In an action for money had and received to the plaintiff's use, the defendant pleaded the general issue; and the cause came on to be tried before De Grey, chief justice, at the sittings after Easter Term. A verdict was given for the plaintiff on the following case. The plaintiff, in 1770, was nominated and appointed to the donative of Chester-le-Street in the diocese of Durham, with cure of souls. He was then in priest's orders, and had subscribed the Thirty-nine Articles, and the three articles in the thirty-sixth canon, at the time of his ordination; but did not prove at the trial of the cause (though required so to do) that he subscribed the articles before the Bishop of Durham as ordinary of the diocese, nor that he had publicly read the same in the church of Chester-le-Street aforesaid, with declaration of his assent to the same; nor that he had subscribed the declaration in the statute of 13 & 14 Car. II.,

[b] Hodgson's Instructions.
[c] *Woodcock* v. *Smith*, T. 1718, quoted 1 Burn's E. L. Benefice.
[d] 3 Anst. 942. [e] 3 Wils. 367.

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since his nomination to the donative; nor that he had a license from the bishop to preach in the said church of Chester-le-Street. The question was, whether he was in a situation to maintain this action. The case was argued in two several terms; after which the lord chief justice delivered the opinion of himself, Gould, Blackstone and Nares, justices. "There have been two questions made upon this case: first, whether an incumbent of a donative, with cure, is obliged to conform to the statutes of Elizabeth and Charles II. Secondly, whether in this action it was necessary for him to give evidence that he had performed the several requisites contained in these statutes. As our opinion is founded upon the second question, it is not necessary, nor do we give any judicial determination upon the former. But we strongly incline to think that donatives, with cure of souls, are within all the reasons, religious as well as political, upon which those facts are founded. As to the second question, we are all of opinion, that in the present case, as no evidence was given by the defendant to raise a doubt whether the plaintiff had subscribed, it was not incumbent on him to give evidence of his having actually done so. The presumption always is, that every man conforms to the law, and that presumption shall stand till something appears to shake it. Nor is the defendant hereby put upon proving a direct negative. It is a negative qualified with circumstances: some of these ceremonies are to be performed publicly, within a limited time; registers are kept of others. And if evidence had been given that a person had regularly attended the church, and heard nothing of this matter; or if a search had been made in the bishop's register, and nothing had been found therein, this would have destroyed the presumption, and put the plaintiff on proof of his having performed those requisites. And he mentioned Dr. Sherard's case before Mr. Justice Wilmot, at Sarum assizes, about ten years before, where a prebendary brought an ejectment for a house belonging to his prebend, and was required to show that he had performed the requisites necessary by law to make him prebendary; the judge held, that it ought to be presumed he had performed them, till something appears to the contrary."

SECTION 6.

Of Lapse.

An incident to the right of advowson.

The present branch of our treatise would appear to be incomplete, if we omitted to mention the subject of lapse,

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yet it is one which concerns the clergyman indirectly only, being an incident to the right of advowson and presentation, in which the patron is more directly interested; for it is a manner in which his right becomes forfeited, before it has been exercised; and, consequently, before the right of advowson has become connected with the rights and laws of the clergy.

Meaning of the word.

Lapse has been called a slip or omission of the patron to present to a church within a certain time;[f] but the word may, perhaps, more properly be defined as the lapse or devolution to another of a right which the proper party has neglected to exercise; but whether it mean the slip of the patron, or the act of devolution, it is a forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present; to the metropolitan, by neglect of the ordinary; and to the king, by neglect of the metropolitan. For it being for the interest of religion, and the good of the public, that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron, who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors.[g] This right of lapse was first established about the time (though not by the authority) of the council of Lateran, which was in the reign of our Henry II., when the bishops first began to exercise universally the right of institution to churches.[h]

Definition of.

When first established.

Incurred in six calendar months.

The term, or space within which the title to present by lapse accrues from the one to the other successively, is six months; and as the computation of time concerns the church, it is made according to the rules of the canon law, that is, by the calendar, for one half year; not counting twenty-eight days to the month. And the day on which the church becomes void is not to be reckoned in the account.[i]

Patron and ordinary the same person.

If the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in; for the forfeiture accrues by law, whenever the negligence has continued six months in the same person.[k] And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are elapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk. For as the law only gives the bishop this title by lapse, to punish the patron's

When lapse may be prevented.

[f] Godolp. 242; Rogers's E. L. 485. [g] Cruise's Dig. tit. xxi. c. 11.
[h] 2 Burn's E. L. 355. [i] Gibs. 768; 2 Inst. 361; Cruise's Dig. ibid.
[k] Wats. c. 12; Gibs. 796.

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negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn.[l]

Not after ordinary or metropolitan had collated.

But if the ordinary or metropolitan has actually collated his clerk to the lapsed benefice, while the turn was respectively theirs, although the clerk be not inducted, and so the church be not completely full, it is a sufficient bar to the patron's presentment.[m]

Patron's right after lapse to the metropolitan.

If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage, if he presents before the archbishop has filled up the benefice; and that for the same reason. Yet the ordinary cannot, after lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop. For he had no permanent right and interest in the advowson as the patron had, but merely a temporary one; which, having neglected to make use of during the time, he cannot afterwards retrieve.[n]

It follows, therefore, that lapse is not an absolute forfeiture of the patron's right, but that another person thereby acquires a right, which is yet not wholly lost to the patron; the forfeiture is not absolute, until that right has been actually exercised by the ordinary or metropolitan.

Lapse to the king.

But if a presentation lapses to the king, prerogative here intervenes and makes a difference; and the patron shall never recover his right, till the king has satisfied his turn by presentation: for "*nullum tempus occurrit regi.*" And, therefore, it may seem as if the church might continue void for ever, unless the king shall be pleased to present, and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hands of, as it were, compelling the king to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the king, indeed, by presenting another, may turn out the patron's clerk; or, after induction, may remove him by *quare impedit;* but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation.[o]

Donatives.

In the case of an advowson donative, where there is no right of institution, no lapse incurs by the non-presentation of the patron within six months; the ordinary may, however, compel the patron to present by means of ecclesiastical censures.[p]

Bishop dying after title by lapse accrues to him.

If title by lapse accrue to a bishop, and he die, or is

[l] 2 Inst. 273; Cruise's Dig. tit. xxi. c. 11.
[m] Ibid.; 2 Black. Com. 276.
[n] Wats. 107; Cruise's Dig. ibid.
[o] Wats. c. 12.
[p] 2 Black. Com. 276.

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translated, or deprived before he takes the benefit of it, the devolution is to the metropolitan as guardian of the spiritualties, as this is not an interest, but a personal trust.

It is said to be doubtful whether the devolution be to the metropolitan or to the king, in case of benefices belonging to the see; but it seems the presentation in such a case belongs to the king.

Lapse must first accrue to the immediate ordinary.

Title by lapse can never accrue to the metropolitan or to the king, unless it has previously accrued to the immediate ordinary, even though the lapse be lost by default of the ordinary, as for the want of giving notice or the like.[q]

Thus far the law of lapse appears to be very clear; and few questions appear to have arisen on it. It may be more difficult in each case to determine from what time the six months after which the lapse takes place are to be computed.

From what time the six months are to be computed.

The rule of the canon law in all cases is, that the six months should be reckoned, not from the time of the avoidance, but from the time when the patron had notice of the avoidance. As if the incumbent dies beyond sea, the six months shall not be counted from the time of his death, but from the time of the patron's knowledge thereof.[r] And so it is said that it was adjudged upon a writ in the reign of Edward the Second; and Watson says, "it has been holden that the six months for lapse on an avoidance shall not be accounted, but from the time the patron could reasonably be supposed to have notice of the incumbent's death, especially if the patron or incumbent should happen to be beyond the seas, or in some remote country within the realm at the time of such avoidance;" but by the common law of England, the six months he supposes are to be accounted from the time of the death of the last incumbent.[s]

From time of patron's knowledge thereof.

It has been laid down in a modern work that the law, as now understood, seems to be, that where the avoidance is occasioned by the act of God, as in case of death, or by the act of the incumbent himself, as in the case of cession, no notice need be given; but the patron is bound to take notice of it, and so time runs from the time of the death or cession.[t] It is presumed, however, that this statement must still admit of the exception or qualification that even where the avoidance is occasioned by the act of God, yet if the incumbent was beyond seas, time is not to be computed from the time of the death, but from the time of notice or intelligence of it arriving in this country. Lapse might

[q] 2 Burn's E. L. 358; Gibs. 769.
[r] 2 Roll's Abr. 363; Cruise's Dig. tit. xxi. c. 11.
[s] Wats. c. 1. [t] Rogers's E. L. 488.

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otherwise occur, without the slip or omission of the patron; and his right would be unjustly forfeited, without any reasonable presumption that the church could be the sooner filled; for which purpose, it will be remembered, that the right of lapse was given.

Cases in which the patron must take notice of the avoidance at his peril.

The patron must take notice, at his peril, of all those cases, and lapse accrues as against him:—

Where the avoidance is by the act of God.[u]

Where the avoidance is created by an union. As there can be no union without the patron's knowledge, and it must be appointed who shall present after that union, the patron must necessarily be privy to it, and to the avoidance consequent on it; so the six months are to be accounted from the time of the agreement.[x]

Where the incumbent has accepted such other preferment, as under the statute to prevent holding benefices in plurality[y] would render that already held by him void; for these are considered matters of equal notoriety to the patron and ordinary.

Where a lay patron has presented a clerk to the bishop, and the bishop refuses him for some temporal cause.

Where an ecclesiastical person has presented a clerk to the bishop, and the bishop refuses him for a temporal cause, or for default of learning, or because he is a heretic or schismatic, or, as it would seem, for any other cause. But it may be questioned whether, in these latter cases, it would not be proper to give notice.[z]

Where the clerk of an ecclesiastical patron is refused *quasi criminosus*, although notice must be given in order that another clerk may be presented, yet the six months reckon from the avoidance and not from the notice.

Cases where the ordinary must give notice to the patron.

But no lapse shall accrue, except from the time when the ordinary gives notice to the patron.

Where the avoidance happens by an act done by privity of the ordinary and incumbent, as in all cases of

Resignation, and

Deprivation.

For these are not matters of equal notoriety to the patron and the ordinary.[a]

And so where the bishop refuses to present the clerk of a lay patron for default of learning, or because he is a schismatic or heretic, or for any other matters of ecclesiastical cognizance, for the law, as it seems, does not

[u] 2 Burn's E. L. 356; 2 Inst. 632.
[x] Rogers's E. L. 489. [y] 1 & 2 Vict. c. 106.
[z] Wats. c. 12; vide *R.* v. *Archbishop of Canterbury and Bishop of London*, 15 East, 143.
[a] Dyer, 292.

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presume a lay patron to be always capable of choosing a proper clerk in such respects, and therefore if he presents an insufficient one, it is not to be at his peril.[b]

Mode in which the bishop is to give notice to the patron where the incumbent has been deprived under the provisions of 1 & 2 Vict. c. 106.

Where a sequestration has issued under the provisions of the act to prevent holding benefices in plurality, for disobedience to the bishop's monition or order; or if two such sequestrations shall have issued within the space of two years, and neither of them shall have been set aside upon appeal, such benefice shall thereupon become void, that is to say, the incumbent shall be deprived; and, according to the established law, such would have been the case where notice should have been given, and where the period of lapse would have commenced from the time of giving such notice; but it has been thought fit in this, as in so many other instances, to re-enact in substance the previously acknowledged law, or rather to make a distinction in the mode of giving notice in this and in other kinds of deprivation; for it is enacted that the bishop, on such benefice so becoming void, shall give notice in writing under his hand to such patron, which notice shall either be delivered to such patron, or left at his usual place of abode, or if such patron or place of abode shall be unknown, or shall be out of England, such notice shall be twice inserted in the London Gazette, and also twice in some newspaper printed and usually circulated in London, and in some other newspaper usually circulated in the neighbourhood of the place where such benefice is situated; and for the purposes of lapse, the avoidance of the benefice shall be reckoned from the day on which such notice shall have been delivered as aforesaid, or from the day on which six months shall have expired after the second publication of such notice in the London Gazette, as the case may be; and every such notice in the Gazette and newspapers shall state that the patron, or the place of abode of the patron, is unknown, or that he is said to be out of England, as the case may be, and that the benefice will lapse, at the furthest, after the expiration of one year from the second publication thereof as aforesaid; and upon any such avoidance, it shall not be lawful for the patron to appoint by donation, or present or nominate to such benefice so avoided, the person, by reason of whose non-residence the same was so avoided.[c]

Same mode of giving notice where clergyman is deprived for illegal trading.

By the same statute it is declared, that if any spiritual person shall trade or deal in any manner contrary to the

[b] 2 Inst. 632; 2 Roll. Ab. 364; 2 Burn's E. L.

[c] Sect. 58. The particularity to be observed in the mode of giving this notice, seems to have provided much probable difficulty and litigation.

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provisions of that act, and which provisions we have elsewhere noticed, he shall for his third offence be deprived *ab officio et beneficio*, in which case, although it is presumed the law was previously fully clear and sufficient, it is enacted that the bishop shall forthwith give notice thereof in writing under his hand to the patron of the preferment held by the person deprived, such notice to be given in the manner in which notice is required to be given to the patron of a benefice continuing under sequestration for one whole year, and thereby becoming void; and any such cathedral preferment or benefice shall lapse, at such period after the said notice, as any benefice continuing under sequestration for one whole year would lapse under the provisions of that act.[d]

Where clergyman is deprived for not reading in, notice must be given to patron.

Where deprivation is the penalty annexed by statute for neglect or default of reading in in the church after induction, according to such forms as have been already mentioned, it is expressly declared by the statute, that no lapse can accrue but after six months after notice of such deprivation, given by the ordinary to the patron.[e]

Lapse in case of death of the ordinary.

In all cases where lapse would not occur without notice, if the ordinary die before it is given, no lapse can occur to his successor before notice by him; and in case of death after lapse, the king, by his prerogative, shall have the presentment, and not the executors of the ordinary.[f]

In all cases where the patron is to have notice, it ought to be given to himself, if he be resident in the county; if not, it should be affixed to the church door, so that public intimation may be given. But it appears to be among the doubtful questions which may arise under the provisions of the statute 1 & 2 Vict. c. 106, s. 58, whether the former mode of giving notice is superseded.

[d] Sect. 31. [e] 13 & 14 Car. 2, c. 4, s. 16.
[f] Hob. 154; Rogers's E. L. 490.

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CHAPTER II.

OF THINGS INCIDENT TO THE POSSESSION OF A BENEFICE.

SECTION 1.

Of Residence.

WHEN a clergyman has, in the manner before mentioned, obtained full possession of his benefice, and thereby become a complete incumbent, he is subject in consequence to two particular restrictions. He is generally compelled to reside upon that benefice, and while holding it, he generally is incapable of taking and holding any other. These two general restrictions, and the particular cases of exception from them, are therefore to be here considered.

In neither of these matters does it appear useful to enter into the state of the law as it may formerly have existed on these subjects. Various statutes have at different times been passed, and the law, in both instances, has undergone considerable variation, but it is now entirely dependent on, and appears to have been satisfactorily settled by, the recent statute of the 1 & 2 Vict. c. 106.

Residence under the 1 & 2 Vict. c. 106.

And first, as regards residence, it is the principle of that act, that every beneficed clergyman should be compelled to reside upon his benefice, or if he have two benefices, upon one of them.

Every incumbent to reside on his benefice, and in the house of residence.

Every spiritual person holding any benefice shall keep residence on his benefice, and in the house of residence (if any) belonging thereto; and if any such person shall, without any such license or exemption as is in this act allowed for that purpose, or unless he shall be resident at some other benefice of which he may be possessed, absent himself from such benefice or from the house of residence, if any, for any period exceeding the space of three months together, or to be accounted at several times in any one year, he shall, when such absence shall exceed three months, and not exceed six months, forfeit one-third part of the annual value of the benefice from which he shall so absent himself; and when such absence shall exceed six

Forfeiture of part of the annual value of living proportioned to the length of non-residence.

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months, and not exceed eight months, one half part of such annual value; and when such absence shall exceed eight months, two-third parts of such annual value; and when such absence shall have been for the whole of the year, three-fourth parts of such annual value.[a]

Any bishop, upon application in writing by any spiritual person holding any benefice within his diocese, whereon there shall be no house or no fit house of residence, by license under his hand and seal, to be registered in the registry of the diocese, which the registrar is by the act required to do, may permit such person to reside in some fit and convenient house, although not belonging to such benefice; such house to be particularly described and specified in such license, and for a certain time to be therein also specified, not exceeding the period by the act limited, and from time to time, as such bishop may think fit, he may renew such license, and every such house shall be a legal house of residence for such specified time to all intents and purposes; provided that no such license shall be granted to such spiritual person to reside in any house, unless it be within three miles of the church or chapel of such benefice, nor in case such church or chapel be in any city or market, or borough town, unless such house be within two miles of such church or chapel.[b]

License to reside within a certain distance of the church, where there is no fit parsonage house.

In cases where houses of residence have been purchased, built or procured, or may hereafter be purchased, built or procured, by the governors of Queen Anne's Bounty, and which, though not situated in the parish, are yet so near thereto as to be sufficiently convenient and suitable for the residence of the officiating minister, such houses having been previously approved by the bishop of the diocese, by writing under his hand and seal, duly registered in the registry of the diocese, shall be deemed the houses of residence belonging to such benefices, to all intents and purposes whatsoever.[c]

Houses built or procured by Queen Anne's Bounty when to be deemed the regular houses of residence.

Such being the general and simple rule laid down respecting residence, the statute proceeds to determine the cases of exemption and exceptions from it as follows:

Exceptions from the above rules.

No spiritual person, being head ruler of any college or hall within either of the universities of Oxford or Cambridge, or being warden of the university of Durham, or being head master of Eton, Winchester or Westminster School, or principal or any professor of the East India College, having been appointed such principal or professor before the time of the passing of the act, and not having respectively more than one benefice with cure of souls,

Heads of colleges, &c.

[a] 1 & 2 Vict. c. 106, s. 32. [b] Sect. 33. [c] Sect. 34.

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shall be liable to any of the penalties or forfeitures in this act contained for or on account of non-residence on any benefice.[d]

Certain other parties exempted from penalties for non-residence while actually engaged in their several duties elsewhere.

No spiritual person, being dean of any cathedral or collegiate church, during such time as he shall reside upon his deanery, and no spiritual person, having or holding any professorship, or any public readership in either of the said universities, while actually resident within the precincts of the university, and reading lectures therein (provided that a certificate under the hand of the vice-chancellor or warden of the university, stating the fact of such residence, and of the due performance of such duties, shall in every such case be transmitted to the bishop of the diocese wherein the benefice held by such spiritual person is situate, within six weeks after the 31st day of December in each year), and no spiritual person, serving as chaplain of the queen or king, or of the queen dowager, or of any of the queen's or king's children, brethren or sisters, during so long as he shall actually attend in the discharge of his duty as such chaplain in the household to which he shall belong; and no chaplain of any archbishop or bishop, whilst actually attending in the discharge of his duty as such chaplain; and no spiritual person actually serving as chaplain of the House of Commons, or as clerk of the queen's or king's closet, or as a deputy clerk thereof, while any such person shall be actually attending and performing the functions of his office; and no spiritual person serving as chancellor or vicar-general, or commissary of any diocese, whilst exercising the duties of his office; or as archdeacon, while upon his visitation, or otherwise engaged in the exercise of his archidiaconal functions; or as dean or subdean, or priest or reader, in any of the queen's or king's royal chapels at St. James's or Whitehall, or as reader in the queen's or king's private chapels at Windsor or elsewhere, or as preacher in any of the inns of court, or at the rolls, whilst actually performing the duty of any such office respectively; and no spiritual person, being provost of Eton College, or warden of Winchester College, or master of the Charter House, or principal of St. David's College, or principal of King's College, London, during the time for which he may be required to reside, and shall actually reside therein respectively, shall be liable to any of the penalties or forfeitures in this act contained, for or on account of non-residence on any benefice for the time in any year, during which he shall be so as aforesaid resident, engaged or performing duties, as the case may be; but

[d] Sect. 37.

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every such spiritual person shall, with respect to residence on a benefice under this act, be entitled to account the time in any year during which he shall be so as aforesaid resident, engaged or performing duties, as the case may be, as if he had legally resided during the same time on some other benefice.[e]

Certain other persons exempted for period not exceeding five months in each year.

Any spiritual person, being prebendary, canon, priest vicar, vicar choral, or minor canon, in any cathedral or collegiate church, or being a fellow of one of the said colleges of Eton or Winchester, who shall reside and perform the duties of such office, during the period for which he shall be required to reside and perform such duties by the charter or statutes of such cathedral, or collegiate church or college, as the case may be, may account such residence as if he had resided on some benefice; but this is not to be construed to permit or allow any such prebendary, canon, priest vicar, vicar choral, minor canon or fellow, to be absent from any benefice, on account of such residence and performance of duty, for more than five months altogether in any one year, including the time of such residence on his prebend, canonry, vicarage or fellowship; but any spiritual person, having or holding any such office, in any cathedral or collegiate church or college, in which the year for the purposes of residence is accounted to commence at any other period than the 1st of January, and who may keep the periods of residence required for two successive years at such cathedral, or collegiate church or college, in whole or in part, between the 1st of January and the 31st of December in any one year, may account such residence, although exceeding five months in the year, as reckoned from the 1st of January to the 31st of December, as if he had resided on some benefice.[f]

Persons exempt before the act not affected by it as to benefices then held by them.

The statute has no retrospective operation, so as to affect the rights of those previously exempt from residence; for it is declared that every spiritual person, being in possession of any benefice, at the time of the passing of the act, and entitled by the law, previously in force, to exemption from residence, or to apply for a license for non-residence, shall, as to every such benefice, but not as to any after-taken benefice, be entitled to the same exemption from residence, and to the same capacity of applying for and obtaining a license for non-residence, and to the same right of appeal, in case of refusal or revocation of a license, to which he was entitled before the time of the passing of this act; and every bishop and other person empowered before the passing of this act to grant such license to such spiri-

[e] Sect. 38. [f] Sect. 39.

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tual person, shall have the like power after the passing thereof.[s]

Particular cases of exemption.

In addition to these general cases of exemption, provided for by the statute, it is provided that, in particular instances, the bishop, at his discretion, may grant licenses for non-residence. The manner in which they are to be applied for, and the cases in which they may be obtained, are as follows:

Licenses for exemption how applied for.

Every spiritual person, applying for a license for non-residence, must present to the bishop a petition, signed by himself, or by some person approved by the bishop in that behalf, and the petition must contain the following particulars:

Particulars to be contained in the petition.

1. Whether such spiritual person intends to perform the duties of his benefice in person, and if so, where and at what distance from the church or chapel he intends to reside.

2. What salary he proposes to give his curate, if he intends to employ one.

3. Whether such curate proposes to reside in the parish in which such benefice is situated.

4. If the curate does intend to reside, then whether in the house of residence belonging to the benefice, or in any and what other house.

5. If the curate does not intend to reside in the parish, then at what distance therefrom, and at what place such curate intends to reside.

6. Whether such curate serves any other and what parish, and if so, whether it is as incumbent or curate; whether he has any and what cathedral preferment, or any and what benefice, or whether he officiates in any and what other church or chapel.

7. The annual value and the population of the benefice in respect of which any license for non-residence is applied for.

8. The number of churches or chapels, if more than one upon such benefice.

9. The date of the admission to the benefice of the party petitioning.

Without which no license can be granted.

The bishop has no discretionary power to grant a license for non-residence, unless everything above mentioned is complied with; for it is declared that it shall not be lawful for the bishop to grant any such license unless such petition shall contain a statement of the several particulars aforesaid, and consequently any license granted upon a

[s] Sect. 40.

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petition which did not contain such particulars would be void.[h]

Every such petition is to be filed in the registry of the diocese by the registrar thereof, and is to be open to inspection, and copies thereof may be made with the leave, in writing, of the bishop;[i] and, according to the words of the statute, it seems that even if the petition were refused, it must nevertheless be filed in the registry of the diocese, and that there is no difference in this respect. Petition to be filed.

The bishop, upon such petition being presented to him, and upon such proofs being adduced, as to any facts stated in any such petition, as he may thing necessary and shall require, is empowered to grant in such cases as are hereinafter enumerated, in which he shall think fit to grant the same, a license in writing under his hand for such spiritual person to reside out of the proper house of residence of his benefice, or out of the limits of his benefice, or out of the limits prescribed by this act, for the purpose of exempting such person from any pecuniary penalty in respect of any non-residence thereon; which license shall express the cause of granting the same license.

The following are the cases in which only the bishop is empowered to grant such licenses: Cases in which the bishop may grant such licenses.

1. Where the clergyman is prevented from residing by any incapacity of mind or body. Clergyman incapacitated.

2. In consequence of the dangerous illness of his wife or child, making part of his family, and residing with him as such, a temporary license may be granted for a period not exceeding six months; but no license on such account is to be renewed, save with the allowance of the archbishop of the province, previously signified under his hand in pursuance of a recommendation in writing from the bishop, setting forth the circumstances, proofs and reasons which induce him to make such recommendation. Illness of his wife or child.

3. Where there is no house of residence, or where the house of residence is unfit for the residence of the clergyman, such unfitness not being occasioned by his negligence, default or other misconduct; such clergyman must, in that case, keep the house of residence, if any, and the buildings belonging to it in repair, to the satisfaction of the bishop; and a certificate signed by two neighbouring incumbents, and counter-signed by the rural dean, if any, must be first produced to the bishop, certifying that no house convenient for the residence of such clergyman can be obtained within the parish, or within the limits specified by the act. Where no house of residence.

[h] Sect. 42. [i] Ibid.

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Where clergyman occupies another house of his own within the parish.

4. Where the clergyman is also the owner and occupier of any other house in the parish, a license may be granted to reside in such house; in which case the clergyman to whom such license is granted must keep the house of residence and buildings belonging to it in repair, and produce to the bishop proof thereof to his satisfaction at the time of granting every such license.[k]

It will be observed, therefore, that in order to enable the bishop to exercise his discretionary power, not only must the particulars mentioned be observed in the petition, but the case must also fall within one of the four cases last mentioned. In all these cases, however, upon refusal by the bishop, the party petitioning may, within one month after refusal, appeal to the archbishop.[l]

Appeal if license is refused.

Special licenses in other cases must be confirmed by the archbishop.

In any other cases than those we have already mentioned, the bishop, if he think it expedient, may grant a license for non-residence, provided that the nature and special circumstances of the case, and the reasons which induced him to grant it, shall be forthwith transmitted to the archbishop, who shall proceed therein as provided in cases of appeal, and shall allow or disallow such license in the whole or in part, or make any alteration therein as to the period for which it may have been granted; and no such license shall be valid unless it shall have been so allowed by the archbishop, such allowance being signified by his signature. In such license it shall not be necessary to specify the cause of granting the same.[m] Licenses of this latter kind are therefore to be considered rather as licenses of the archbishop than of the bishop.

Licenses during vacancy of the see, &c.

During the vacancy of any see the power of granting such licenses for non-residence is to be exercised by the guardian of the spiritualties of the diocese, or in case the bishop of any diocese shall be disabled from exercising in person the functions of his office, such power is to be exercised by the person or persons lawfully empowered to exercise his general jurisdiction in the diocese. But no license granted by any other than the bishop is to be valid until the archbishop of the province has signified his approbation of it by signing the same;[n] all such licenses are temporary only, for no such license for non-residence shall continue in force after the 31st of December in the year next after the year in which such license shall have been granted.[o]

Fees for licenses.

Every person obtaining any license of non-residence shall pay for the same, to the secretary or officer of the

[k] Sect. 43. [l] Ibid. [m] Sect. 44.
[n] Sect. 45. [o] Sect. 46.

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bishop or other person granting the same, the sum of ten shillings over and above the stamp duty chargeable thereon, and no more; and also the sum of three shillings, and no more, to the registrar of the diocese; and shall also pay the sum of five shillings to the secretary of the archbishop when any such license shall have been signed by such archbishop.[p]

Licenses not void by death or removal of bishop granting them.

No license for non-residence shall become void by the death or removal of the bishop granting the same; but the same shall be and remain valid notwithstanding any such death or removal, unless the same shall be revoked as hereinafter mentioned.[q]

Licenses may be revoked.

Any archbishop or bishop who shall have granted any license of non-residence as aforesaid, or any successor of any such archbishop or bishop, after having given such incumbent sufficient opportunity of showing reason to the contrary, in any case in which there may appear to such archbishop or bishop good cause for revoking the same, by an instrument in writing under his hand may revoke any such license: provided that any such incumbent may, within one month after service upon him of such revocation, if by a bishop, appeal to the archbishop.[r]

Grants and revocations of licenses to be filed in the registry of the diocese.

We have already seen that every petition for license for non-residence, must be filed in the registry of the diocese; it is also further directed, that every bishop who shall grant or revoke any license of non-residence under this act shall, and *he is required*, within one month after the grant or revocation of such license, to cause a copy of every such license or revocation to be filed in the registry of his diocese, and an alphabetical list of such licenses and revocations shall be made out by the registrar of such diocese, and entered in a book, and kept for the inspection of all persons upon payment of three shillings, and no more; and a copy of every such license, and a statement in writing of the grounds of exemption, shall be transmitted by the spiritual person to whom such license shall have been granted, or who may be exempted from residence, to the churchwardens or chapelwardens of the parish or place to which the same relates, within one month after the grant of such license, or of his taking advantage of such exemption, as the case may be; and every bishop revoking any such license, shall cause a copy of such revocation to be transmitted, within one month after the revocation thereof, to the churchwardens or chapelwardens of the parish or place to which it relates; which copies of licenses and revocations, and statements

And copies to be transmitted to the churchwardens of the parish to which they relate.

[p] Sect. 47. [q] Sect. 48. [r] Sect. 49.

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of exemption, shall be by such churchwardens or chapelwardens deposited in the parish chest, and shall likewise be produced by them, and publicly read by the registrar or other officer at the visitation of the ecclesiastical district within which such benefice shall be locally situate, next succeeding the receipt thereof; and every spiritual person who shall neglect so to transmit a copy of such license or statement of exemption as hereby required, shall lose all benefit of such license, and until he shall have transmitted such statement, shall not be entitled to the benefit of such exemption; provided that in case the archbishop of the province shall, on appeal to him, annul the revocation of any such license, the bishop by whom such revocation shall have been made, shall immediately on receiving notice from the archbishop that he has annulled the same, order, by writing under his hand, that the copies of such revocation shall be forthwith withdrawn from the said registry and parish chest, and that the same shall not be produced and read at the visitation, and that such revocation shall be erased from the list of revocations in the said registry, which order shall be binding on the registrar and churchwardens respectively to whom the same shall be addressed.[s]

Archbishop to transmit annually a list of licenses or renewals to the queen in council.

Every archbishop who shall in his own diocese grant any license for non-residence, or who shall approve and allow any such license in any of the special cases which are not enumerated above, or any renewal of a license in the case of the dangerous illness of the wife or child of any spiritual person, shall annually, in the month of January in each year, transmit to her majesty in council a list of all licenses or renewals so granted or allowed by such archbishop respectively in the year ending on the last day of December preceding such month of January, and shall in every such list specify the reasons which have induced him to grant or allow each such license or renewal, together with the reasons transmitted to him by the bishops for granting or recommending each such license in their respective dioceses; and it shall be lawful for her majesty in council, by an order made for that purpose, to revoke and annul any such license; and if her majesty in council shall think fit so to do, such order shall be transmitted to the archbishop who shall have granted or approved and allowed such license or renewal, who shall thereupon cause a copy of every such order to be transmitted to the bishop of the diocese in which such license shall have been granted; and such bishop shall cause a copy of the mandatory part

The queen in council may revoke such licenses.

[s] Sect. 50.

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of the order to be filed in the registry of such diocese, and a like copy to be delivered to the churchwardens or chapelwardens of the parish or place to which the same relates, in manner hereinbefore directed as to revocation of licenses; and every such archbishop shall cause a copy of the mandatory part of every such order made in relation to any such license granted by him in his own diocese, to be in like manner filed in the registry of his diocese, and a like copy also to be delivered to the churchwardens or chapelwardens of the parish or place to which such license shall relate in manner before mentioned; provided that after such license shall have been so revoked by her majesty in council, the same shall nevertheless in all questions that shall have arisen or may thereafter arise touching the non-residence of the spiritual person to whom the same shall have been granted, between the time at which the same was granted or approved and allowed, and the time of the revocation thereof being so filed in the registry, be deemed and taken to have been valid.[t]

Directions as to the mandatory part of the order revoking such licenses.

In the month of January in every year, the bishop is required to transmit to every clergyman holding any benefice within his diocese or jurisdiction, certain questions respecting residence, the form of which is contained in the act, and is to be found in the Appendix: and every clergyman to whom such questions shall be so transmitted, shall, within three weeks from the day on which the same shall be so delivered to him, make and transmit to the bishop full and specific answers thereto, such answers being signed by such clergyman.[u]

Bishop to transmit annually to every beneficed clergyman in his diocese certain questions respecting residence.

No particular penalty is specified by the act for the neglect to transmit the answers within the time mentioned; it is presumed, therefore, that the bishop might proceed against the clergyman neglecting or refusing so to do, as in any other case of offence against the laws ecclesiastical.

Neglect in sending answers.

On or before the 25th day of March in every year, a return shall be made to her majesty in council by every bishop, of the name of every benefice within his diocese or jurisdiction; and the names of the several spiritual persons holding the same respectively who shall have resided thereon; and also the names of the several spiritual persons who, by reason of any exemption or license granted by such bishop, shall not have resided on their respective benefices; and also the names of all spiritual persons, not having any such exemption or license, who shall not have resided on their respective benefices, so far as the bishop is informed thereof; and also the substance

Annual returns to be made by every bishop to the queen in council.

[t] Sect. 51.

[u] Sect. 52. And see Appendix.

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of the answers received in all cases to the questions so transmitted as aforesaid.[x]

We have now gone through the cases of exception to the general rule which was first mentioned, that every beneficed clergyman is compelled to reside upon his benefice; and we have seen the various rules by which such cases of exception are regulated, returning now to the general rule, we are to see in what manner residence may be enforced.

How residence may be enforced.

In every case in which it shall appear to the bishop that any spiritual person, holding any benefice within his diocese, and not having a license to reside elsewhere than in the house of residence belonging thereto, not having any legal cause of exemption from residence, does not sufficiently, according to the true meaning and intent of the act,[y] reside on such benefice, it shall be lawful for such bishop, instead of or after proceeding for penalties, to issue or cause to be issued a monition to such spiritual person, requiring him forthwith to proceed to and to reside on such benefice, and perform the duties thereof, and to make a return to such monition within a certain number of days after the issuing thereof; provided that in every such case there shall be thirty days between the time of serving such monition on such spiritual person, in the manner hereinafter directed, and the time specified in such monition for the return thereto; and the spiritual person on whom any such monition shall be served shall, within the time specified for that purpose, make a return thereto into the registry of the diocese, to be there filed: and it shall be lawful for the bishop, to whom any such return shall be made, to require such return, or any fact contained therein, to be verified by evidence; and in every case where no such return shall be made, or where such return shall not state such reasons for the non-residence of such spiritual person, as shall be deemed satisfactory by the bishop, or where such return, or any of the facts contained therein, shall not be so verified as aforesaid, when such verification shall have been required, it shall be lawful for the bishop to issue an order in writing under his hand and seal, requiring such spiritual person to proceed and reside as aforesaid, within thirty days after such order shall have been served upon him; and in case of non-compliance with such order, it shall be lawful for the bishop to sequester the profits of such benefice until such order shall be complied with, or other sufficient reasons

By monition.

Return to the monition.

Proceedings after monition and return.

Bishops may sequester for non-residence after monition.

[x] Sect. 53.

[y] It appears that the exact meaning or definition of residence is a matter for the judgment of the bishop.

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for non-compliance therewith shall be stated and proved as aforesaid.[z]

The mode in which it is directed that the sequestered profits are to be applied, will be spoken of under the head of sequestration. It need here only be observed, that an appeal is given to the archbishop, within one month after service of the order of sequestration, but the sequestration is nevertheless to be in force during the appeal.[a]

Appeal from order of sequestration.

Every spiritual person, to whom any such monition or order in writing shall be issued as aforesaid, who shall be at the time of the issuing thereof absent from his benefice, contrary to the provisions of this act, but who shall forthwith obey such monition or order, and the profits of whose benefice shall by reason of such obedience not be sequestered, shall nevertheless pay all costs, charges and expenses incurred by reason of the issuing and serving such monition or order, and the proceedings thereon shall not be stayed until such payment shall be made.[b]

Costs and expenses of the monition.

And, for effectually enforcing *bonâ fide* residence, according to the intent of such monition and order, it is enacted, that if any spiritual person, not having a license to reside out of the limits of his benefice, nor having other lawful cause of absence from the same, who after any such monition or order as aforesaid, requiring him to reside, and before or after any such sequestration as aforesaid, shall, in obedience to any such monition or order, have begun to reside upon his benefice, shall afterwards, and before the expiration of twelve months next after the commencement of such residence, wilfully absent himself from such benefice for the space of one month together, or to be accounted at several times, it shall be lawful for the bishop, without issuing any other monition or making any order, to sequester and apply the profits of such benefice, as before directed by this act, for the purpose of enforcing the residence of such spiritual person, according to the true intent of the original monition issued by the bishop as aforesaid; and it shall be lawful for the bishop so to proceed in like cases from time to time as often as occasion may require.[c]

If a party who has complied with the monition absents himself again for a month within twelve months of such compliance, the bishop may forthwith sequester.

But in each of such cases an appeal is in like manner as before-mentioned given to the archbishop, within one month after the service of the order of sequestration.

Appeal.

Upon a comparison of the words of this last section with those of the 54th section already mentioned, it would seem doubtful whether under the 54th section the bishop has any power to proceed at once for penalties by seques-

[z] Sect. 54. [a] Ibid. [b] Sect. 55. [c] Sect. 56.

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tration, without having first issued his monition, notwithstanding the words of that section would appear to give him an option of proceeding in whichever manner he might think proper; for it is obvious, that if under the 54th section it was intended that he should have such option, then the provisions of the 56th section would have been wholly superfluous and unnecessary.

Remission of penalties.

In every case, in which any archbishop or bishop shall think proper, after proceeding by monition for the recovery of any penalty, under this act, for non-residence, of more than one-third part of the yearly value of any benefice, for any non-residence exceeding six months in the year, to remit the whole, or any part of any such penalty, such archbishop shall forthwith transmit to her majesty in council, and such bishop shall forthwith transmit to the archbishop of the province to which he belongs, a statement of the nature and special circumstances of each case, and the reasons for the remission of any such penalty; and it shall thereupon be lawful for her majesty in council, or for the archbishop, as the case may be, to allow or disallow such remission in whole or in part, in the same manner as is provided with relation to the allowance or disallowance of licenses of non-residence granted in cases not expressly enumerated: provided that the decision of the archbishop, with respect to cases transmitted to him from a bishop, shall be final.[d]

Non-residence on account of house occupied by tenant.

The provisions for avoiding contracts for the letting of houses of residence have been already mentioned elsewhere. Until these have been put in force, and during the time that any tenant continues to occupy such house of residence, no spiritual person is to be liable to any penalty for not residing in the same.[e]

Section 2.

Of Pluralities.

Pluralities.

There is probably no branch of the law relating to ecclesiastical matters, or affecting ecclesiastical persons, which has been so completely altered by recent enactment, as that which relates to pluralities. And very much that was formerly important with regard to the chaplains of the nobility, the persons qualified to obtain, and the mode of obtaining dispensations to hold two or more benefices, has been now completely swept away.

Recent alteration in the laws regarding them.

The law as regards pluralities does not so much affect

[d] Sect. 57. [e] Sect. 60.

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the persons holding, and continuing to hold, as those taking to a second benefice. It is at the particular time when the second benefice is taken, that these laws are to be observed, so that it would be quite unnecessary, in the present instance, to enter at all into the repealed law, which can never now be found applicable or useful. It will be sufficient, before mentioning the provisions of the recent statute, to show very briefly what has formerly been the opinion and practice of the Church on this subject.

Pluralities in the early ages of the Church.

In the earlier and more simple ages of the Church, pluralities seem never to have been contemplated; priests were forbidden to desert their own churches; and if any did so, they were ordered to be removed from their office, until reconciled to their own church. No priest was to go from the see of the holy church, under whose title he was ordained, in order to remove to a strange church, but there devoutly remain until the end of his life.

Canon of the Council of Lateran regarding them.

How long such directions as these continued to be observed in this country must be doubtful; but by a canon made in the Council of Lateran, holden under Pope Innocent III., in the year 1215, it was ordained, that whosoever should take any benefice with cure of souls, if he should before have obtained a like benefice, should *ipso facto* be deprived thereof; and, if he should contend to retain the same, should be deprived of the other; and the patron of the former, immediately after his accepting of the latter, shall bestow the same upon whom he shall think worthy. There can be little doubt, that, therefore, before that time, the holding plurality of benefices had begun, and that this canon was made to check the practice.

Directions respecting them in the constitutions of Othobon.

In the constitutions of Othobon, also, the mischiefs of pluralities are mentioned; and it is stated, that many constitutions had been made against them, but which, to the detriment of religion, had been eluded; and directions are given to the bishops to put these constitutions in execution: particularly, before institution, the bishop is directed to inquire whether the presentee has any other benefice—but there is also the important addition, that if he have any other benefice, the bishop shall inquire whether he has a sufficient dispensation—and the same inquiries as to pluralities and dispensations are directed to be made of bishops before they are confirmed.

Constitutions of Archbishop Peccham respecting them.

And so, by the constitutions of Archbishop Peccham it is declared, that he who shall have more benefices than one with cure of souls, without dispensation, shall hold only the last; and if he shall strive to hold the rest, he shall forfeit all. And it is further decreed, that he who

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shall take more benefices than one, having cure of souls, or being otherwise incompatible, without dispensation apostolical, either by institution, or by title of *commendam*, or one by institution, and another by *commendam*, except they be held in such manner as is permitted by the constitution of Gregory, published in the Council of Lyons, shall be deprived of them all, and be *ipso facto* excommunicated, and shall not be absolved but by us, or our successors, or the apostolic see.[f]

Effect of these constitutions.

From these constitutions, it may be plainly seen that this offence against ecclesiastical discipline of holding two or more benefices, formed no exception to the general rule in offences of this character in earlier times; an immunity from which might be purchased for money, and which were consequently only regarded as so many sources of emolument; for it is not so much against the evil itself that the constitution seems to have been directed, as against the non-payment for exemption. The holding two benefices, the real mischief, was abundantly tolerated; but the holding them without dispensation was punished in the severest manner, by loss of one or both of such benefices.

Dispensations granted for holding pluralities of benefices.

Extent of.

And the extent to which this system of dispensations was carried, appears from a case cited by Dr. Burn from some older treatises on this subject, of one Bogo de Clare, rector of St. Peter's in the East, in Oxford, who in the eighth year of King Edward I. was presented by the Earl of Gloucester to the church of Wyston, in the county of Northampton, and obtained a dispensation to hold the same, together with one church in Ireland, and fourteen other churches in England, in nine different dioceses; all which benefices were valued at the time at 268*l.* 6*s.* 8½*d.*[g]

Thus the matter seems to have continued until the reign of Henry VIII., when all those privileges, which the pope had theretofore exercised, began to be more nearly examined; and in the twenty-first year of that reign an act was passed, by which the holding pluralities was regulated, and the practice in some degree checked for the future. But dispensations were still allowed to be obtained, and various directions were given for the cases in which they were to be granted; which cases were in fact so numerous, that there could scarcely have been any clergyman who might not have brought himself within some of them. The cases which were decided upon the

Statute of Hen. VIII. for regulating.

Dispensations under.

[f] Lyndw. 137.

[g] Kenn. Par. Ant. 292; Wood's Hist. and Ant. of Univ. of Oxford, 116; 3 Burn, E. L. 99.

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statute appear to have given it a most liberal construction, so that pluralities were still very common, the power of granting dispensations only being transferred.

This statute has been entirely repealed by the 1 & 2 Vict. c. 106, and the law is now entirely regulated by this latter statute; the enactments of which, being positive, supersede not only the repealed statute, but the directions of the canon law likewise. Recent statute of Victoria. Present state of the law.

No spiritual person, holding more than one benefice, shall accept or take to hold therewith any cathedral preferment or any other benefice. Cathedral preferment.

No spiritual person holding any cathedral preferment, and also holding any benefice, shall accept or take to hold therewith any other cathedral preferment, or any other benefice.[h]

No spiritual person, holding any preferment in any cathedral or collegiate church, shall accept and take to hold therewith any preferment in any other cathedral or collegiate church.[i]

The term "cathedral preferment" here used, is to be construed to comprehend every deanery, archdeaconry, prebend, canonry, office of minor canon, priest vicar, or vicar choral, having any prebend or endowment belonging thereunto, or belonging to any body corporate consisting of persons holding any such office, and also every precentorship, treasurership, sub-deanery, chancellorship of the church, and other dignity and office in any cathedral or collegiate church, and every mastership, wardenship, and fellowship in any collegiate church.[k] Meaning of the term.

No spiritual person, holding any benefice, shall accept and take to hold therewith any other benefice, unless it shall be situate within ten statute miles from such first mentioned benefice.[l] No two benefices to be held together unless within certain distance.

By the canon law it was directed that no license or dispensation should be granted for holding two or more benefices, where they were more than thirty miles distant from one another, but the manner in which this restriction was explained, or altogether evaded, will best appear from the following case. Restriction as to distance by the canon law.

In the Common Pleas: in a *quare impedit*, on the presentation to the rectory of Adderly St. Peter, in the county of Salop, being a benefice of above 8*l.* value in the king's books: the declaration stated, that Clive, being incumbent of Adderly, had accepted the vicarage of Clun, at more than thirty miles distant from Adderly, whereby the latter became void. Clive pleaded a dispensation under

[h] Sect. 2. [i] Ibid. [k] Sect. 124. [l] Sect. 3.

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the great seal, and denied that the livings were more than thirty miles distant. And upon that issue was joined. On the trial it was proved, by an actual admeasurement along the turnpike road, that the distance from church to church was forty-eight miles, from parish to parish forty-three miles; that the direct horizontal distance from church to church was forty-two miles, from parish to parish thirty-eight miles; but that by computation in the country, the two livings were but twenty-nine miles distant; and *this was the usual method of computing distances upon such dispensations. Of which opinion was the judge who tried the cause, and a special jury:* who found a verdict for the defendant. It was moved for a new trial, alleging that the measured distance was the only one the law could take notice of; and the statute of 35 Eliz. c. 6, was cited, wherein a mile is declared to contain eight furlongs, each furlong forty poles, and each pole sixteen feet and a half. On showing cause against a new trial, it was argued that the distance of the parishes is a matter merely regulated by the canons of the church, which may be directory in such cases to the archbishop, but is not taken notice of in the statute of dispensations, nor ever called in question in the king's temporal courts: therefore the issue is immaterial. But if material, the ecclesiastical laws must be the rule in this case, and there the uniform practice has been to go by computed miles. And the court were clearly of opinion, that, by the temporal law, the distance of the churches is immaterial; and they discharged the rule for a new trial.[m]

Computation of miles by the canon law for this purpose.

And to this case there is appended a note in Dr. Burn's work, mentioning that in many parts of England the computed miles *most commonly run in the proportion of about two computed to three measured miles.*[n]

How distance is now to be computed.

In order to avoid such vague and unintelligible interpretations, it is by the act directed that the distance between any two benefices for this purpose shall be computed from the church of the one to the church of the other, by the nearest road or footpath, or by an accustomed ferry; and if on one of the said benefices there be two or more churches, then the distance shall be computed from or to the nearest of such churches, as the case may be; or if on one of such benefices there be no church, then in such manner as shall be directed by the bishop of the diocese in which the benefice, proposed to be taken and held by any spiritual

[m] *R. v. Bishop of Lichfield and Clive*, Black. Rep. 968.
[n] 3 Burn's E. L. 106.

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person in addition to one already held by him, shall be locally situate.[o]

Restrictions on holding more than one benefice regulated by amount of population.

No spiritual person holding a benefice with a population of more than three thousand persons, shall accept and take to hold therewith any other benefice, having, at the time of his admission, institution, or being licensed thereto, a population of more than five hundred persons.[p]

No spiritual person holding a benefice with a population of more than five hundred persons, shall accept and take to hold therewith any other benefice, having, at the time of his admission, institution, or being licensed thereto, a population of more than three thousand persons.[q]

How population to be computed.

The amount of the population for this purpose is to be taken from the latest returns of population, made under any act of parliament for that purpose, at the time when the question shall arise, if such returns shall apply to the place respecting which the question shall be; but if such place shall only form part of a parish or district named in such returns, then such returns shall be taken to represent truly the population of the parish or district named therein, and from them the population of the place required shall be computed, according to the best evidence of which the subject shall be capable.[r]

Restrictions on holding more than one benefice according to value.

No spiritual person shall hold together any two benefices, if at the time of his admission, institution, or being licensed to the second benefice, the value of the two benefices jointly shall exceed the yearly value of 1000*l.*[s]

Meaning of the word benefice.

The term benefice here used is to be understood and taken to mean benefice with cure of souls, and no other, (unless it shall otherwise appear from the context,) and therein to comprehend all parishes, perpetual curacies, donatives, endowed public chapels, parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel.[t]

The above are the general rules, from which the following are the excepted cases.

Exceptions from the above rules.

Archdeacons.

An archdeacon is not prevented by these rules from holding together with his archdeaconry two benefices, under the limitations we have just mentioned as to distance, joint yearly value, and population; and one of which benefices must be situated within the diocese of which his archdeaconry forms a part, or one cathedral preferment in any cathedral or collegiate church of the diocese of which his archdeaconry forms a part, and one benefice situate

[o] 1 & 2 Vict. c. 106, s. 129. [p] Sect. 4. [q] Ibid.
[r] Sect. 130. [s] Sect. 4. [t] Sect. 124.

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Certain cases of cathedral preferment.

within such diocese. Nor are the above restrictions to prevent any spiritual person holding any cathedral preferment with or without a benefice, from holding therewith any office in the same cathedral or collegiate church, the duties of which are statutably or customarily performed by the spiritual person holding such preferment.[u]

Two benefices within ten miles may be held together, contrary to the above rules, in certain cases.

Where any two benefices are within ten miles of each other, but which, under the provisions just mentioned, could not be holden together, but one of which is below the annual value of 150*l.*, and of which the population exceeds two thousand persons, the bishop or bishops, as the case may be, to whom such benefices are subject, upon application made to him or them for that purpose by the incumbent, may state in writing the reason why such benefices should be holden together, and in such case it shall be lawful for the said incumbent to hold the said two benefices together. But in such a case the bishop of the diocese within which such benefice, having a population exceeding two thousand persons, is situate, may from time to time, by an order under his hand, and revocable at any time, require that such incumbent should keep residence on, and personally serve such benefice, during the space of nine months in each year; and if such incumbent shall not, in obedience to the terms of such order, and until the same be revoked, reside on and personally serve such benefice, he shall be liable to all penalties for non-residence, notwithstanding he may have a legal exemption, permanent or temporary, from residence, or may be resident on some other benefice, or may be performing the duties of an office, the performance of the duties of which might in other cases be accounted as residence on some benefice.[x]

Appeal from order.

But any such spiritual person may, within one month after service on him of any such order, appeal to the archbishop.[y]

License from the Archbishop of Canterbury to hold two benefices.

Before any spiritual person can hold any two benefices together under any of these provisions, he must obtain from the Archbishop of Canterbury a license or dispensation to hold them; which license or dispensation the archbishop is empowered to grant under the seal of his office of faculties, upon being satisfied as well of the fitness of the person, as of the expediency of allowing such two benefices to be holden together; and such license or dispensation shall issue in such manner and form as the said archbishop shall think fit; and for such license or dispensation there shall be paid to the registrar of the said office the sum of thirty shillings, and no more; and to the seal

[u] Sect. 2. [x] Sect. 5. [y] Ibid.

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keeper thereof the sum of two shillings, and no more; and no stamp duty, nor any other fee, shall be payable on the license or dispensation to be granted as aforesaid, nor shall any confirmation thereof be necessary; nor shall it be required of any spiritual person applying for any such license or dispensation to give any caution or security, by bond or otherwise, before such license or dispensation is granted.[a]

Bonds for licenses by the canon.

The bond or security here alluded to was formerly directed to be given by the canon; which, after mentioning the necessary qualification of a party to whom a license should be granted, proceeds, provided always, that he be, by a good and sufficient caution, bound to make his personal residence in each of his said benefices for some reasonable time in every year; and that the said benefices be not more than thirty miles distant asunder; and lastly, that he have under him in the benefice where he doth not reside a preacher lawfully allowed, that is able sufficiently to teach and instruct the people.[a]

Appeal, from refusal by the archbishop to grant licenses, to the queen in council.

If the archbishop shall refuse or deny to grant any such license or dispensation, it shall be lawful for her majesty, if she, by the advice of her privy council, shall think fit, upon application by the person to whom such license or dispensation shall have been refused or denied, to enjoin the said archbishop to grant such license or dispensation, or to show to her majesty in council sufficient cause to the contrary, and thereupon to make such order touching the refusal or grant of such license or dispensation as to her majesty in council shall seem fit; and such order shall be binding upon the archbishop.[b]

Statements to be made by clergymen to the bishop previously to applying for license.

Any spiritual person, desirous of obtaining such a license or dispensation for holding two benefices together, shall, previously to applying for a grant of the same, deliver to the bishop of the diocese, where both benefices are situate in the same diocese; or to the bishops of the two dioceses, where such benefices are situate in different dioceses, a statement in writing, verified as such bishop or bishops respectively may require, according to a form promulgated by the Archbishop of Canterbury, and approved by the queen in council,[c] in which statement such spiritual person shall set forth, according to the best of his belief, the following particulars.

Particulars to be contained in statement.

The yearly income arising from each of such benefices separately, on an average of the three years ending on the 29th day of September next before the date of such statement.

The sources from which such income is derived.

[a] Sect. 5. [a] Canon 41. [b] Sect. 6. [c] For this form see Append.

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The yearly amount on an average of the same period of three years of all taxes, rates, tenths, dues and other permanent charges and outgoings, to which the benefices are respectively subject.

The amount of the population of each of the said benefices, computed according to the last returns made under the authority of parliament.

The distance between the two benefices computed as above-mentioned.

Bishop may test statement.

The bishop to whom such statement is delivered may make any inquiry he may think proper as to the correctness of the same, in respect to the benefice or benefices within his diocese; and within one month after he shall have received such statement, he is *required* to transmit to the Archbishop of Canterbury a certificate under his hand, setting forth or having annexed to it a copy of such statement, and by which he shall certify the amount at which he considers the annual value, and the population of each of such two benefices where both are situate in his diocese, and the distance of such two benefices from each other, or the amount at which he considers the annual value, and the population of the benefice within his diocese, where the two benefices are in different dioceses, and the distance of such benefice from the other benefice ought to be taken with respect to the license or dispensation.[d]

And is required to transmit certificate to archbishop.

Benefice in the jurisdiction of archbishop.

Whenever both or either of the benefices are in the diocese or jurisdiction of the Archbishop of Canterbury, a certificate in the same manner shall be made out by the archbishop and retained by him.[e]

How annual value of benefices is to be estimated for such purposes.

The annual value of any benefice for the purpose of such certificate is to be taken, by deducting from the gross amount of the yearly income arising therefrom, all taxes, rates, tenths, dues and other permanent charges and outgoings to which such benefice is subject. But not deducting or allowing for curate's stipend; nor for such taxes or rates in respect of the house of residence or glebe land as are usually paid by tenants or occupiers; nor for money spent in repairs or improvement of the house of residence, and buildings and fences belonging thereto.[f]

Certificate to be deposited in the office of faculties, and to be evidence.

The certificate or certificates to be transmitted to, or retained by the archbishop, as the case may be, shall be deposited in the office of faculties, and, in the event of the required license or dispensation being granted, shall for the purposes above-mentioned be conclusive evidence of the annual value and population of each of the benefices

[d] Sect. 7. [e] Ibid. [f] Sect. 8.

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to which the same shall relate, and of their distance from each other; and the registrar of the faculties is required to produce such certificate or certificates to any person who may require to inspect the same.[g]

If any spiritual person, holding any cathedral preferment or benefice, shall accept any other cathedral preferment or benefice, and be admitted, instituted, or licensed to the same contrary to the provisions of the act, every cathedral preferment or benefice, so previously held by him, shall be and become *ipso facto* void; as if he had died or had resigned the same; any law, statute, canon, usage, custom or dispensation to the contrary notwithstanding: and if any spiritual person holding any two or more benefices shall accept any cathedral preferment, or any other benefice, or if any spiritual person holding two or more cathedral preferments shall accept any benefice, or if any spiritual person holding any cathedral preferment or preferments, and benefice or benefices, shall accept another benefice, he shall, before he is instituted, licensed, or in any way admitted to the said cathedral preferment or benefice, in writing under his hand, declare to the bishop or bishops within whose diocese or dioceses any of the cathedral peferments or benefices previously holden by him, are situate, which cathedral preferment and benefice, or which two benefices (such two benefices being tenable together under the provisions of the act), he proposes to hold together; and a duplicate of such declaration shall, by such spiritual person, be transmitted to the registry of the diocese, and be there filed; and immediately upon any such spiritual person being instituted, licensed, or in any way admitted to the cathedral preferment or benefice which he shall have accepted as aforesaid, such cathedral preferment or preferments, benefice or benefices, as he previously held, and as he shall not as aforesaid have declared his intention to hold, or such benefice as shall not be tenable under the provisions of the act, with such newly accepted benefice, shall be and become *ipso facto* void, as if he had died or resigned the same; and if such spiritual person shall in any such case refuse, or wilfully omit to make such declaration as aforesaid, every cathedral preferment and benefice which he previously held shall be and become *ipso facto* void as aforesaid.[h] But it is provided, that this shall not be construed to affect the provisions in the excepted cases before-mentioned with respect to archdeacons, or with respect to spiritual persons holding with any cathedral preferment, and with or with-

Acceptance of second preferment contrary to the above rules vacates the former preferment *ipso facto*.

If former preferment is tenable with the second, declaration is to be made to the bishop.

Exceptions.

[g] Sect. 9. [h] Sect. 11.

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out a benefice, offices in the same cathedral or collegiate church.[i]

General effect of this enactment, and especially with respect to lapse.

The effect of this enactment is to make a considerable alteration in the law, not only as it affects the party presented to a second benefice, but as it affects the patron also. We have already seen that by the constitutions of the church and the canon law, a clergyman who accepted a second benefice, without a license or dispensation, was to forfeit the first; and so far therefore the recent enactment above-mentioned was only a carrying out the spirit and intention of the old ecclesiastical law; but it had been decided by a case in the Exchequer Chamber, brought there by a writ of error from the King's Bench, that the result of the authorities was (taking the canon of the fourth Lateran Council to have been recognized in this country, and to have become a part of the common law), that upon institution to the second living, the first was void as to the patron; but not so as to incur a lapse without sentence of deprivation and notice by the ordinary, or at least not until notice by the ordinary. The first living therefore, previously to the recent statute, might rather have been considered voidable than void; for the party accepting the second benefice must either have been deprived of the first by the ordinary, or the patron must have presented another person to the benefice. It was void as regarded the patron, if he chose to avail himself of that fact and present another party; but if he did not do so, it was not so far void as against him, that any lapse would have been incurred, unless the party had been deprived by the ordinary, and the ordinary had given notice of the avoidance to the patron.[k]

Section 3.

Of Exchanging Benefices.

Exchange of lands.

In cases of real property, the word exchange, as used in deeds, has a particular signification and value: it is a mutual exchange of equal interests, the one in consideration of the other: as if (says Littleton) there be two men, and each of them is seised of one quantity of land in one county, and the one granteth his land to the other, in exchange for the other land, which the other hath; and in like manner the other granteth his land to the first

[i] Sect. 11. [k] See Lapse, ante.

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grantee, in exchange for the land which the first grantor hath.[l]

Lands exchanged must be equal in quantity.

In such cases, it is necessary that the estates given be equal, not in value, quality, or in the manner of the estate, but in the quantity of the estate, as an estate in fee for an estate in fee, and an estate for life for an estate for life.[m]

The word exchange is necessary.

It is also necessary that the word exchange should be used, though it is said that the word *permutatio*, or some other word of like effect, may supply it. But if A., by deed indented, give to B. an acre of land in fee simple or for life, and by the same deed B. gives to A. another acre of land in the same manner, this cannot enure as an exchange; and therefore if there be no livery of seisin, it would be utterly void.[n]

At what time entry must be made.

It is also necessary that there should be an execution by entry or claim in the life of the parties, for as livery of seisin is not necessary, the parties have no freehold, in deed or in law, in them till entry. Therefore if both the parties die before the entry of either, the exchange is void; for the heir of one cannot enter and take it as a purchaser, because he is named only to take it by way of limitation of estate in course of descent. But if one enters, and the other dies before entry, his heir may enter.[o]

Implied warranty in exchanges.

In every deed of exchange in which that word is used, there is an implied mutual warranty; and it has been resolved, that in every exchange the word *excambium* implies in itself *tacitè* a condition, and also a warranty; the one to give a re-entry, and the other a voucher and recompence; and all in respect of the reciprocal consideration, the one land being given in exchange for the other. But it is as special warranty; for upon the voucher, by force of it, he shall not recover other land in value, but that only which was by him given in exchange. For inasmuch as the mutual consideration is the cause of the warranty, it shall therefore extend only to lands reciprocally given, and not to other lands. And this warranty runs only in privity; for none shall vouch by force of it but the parties to the exchange, or their heirs, and no assignees. If A. gives in exchange three acres to B. for other three acres, and afterwards one acre is evicted from B., in that case the whole exchange is defeated, and B. may enter into all his land; for although the exchange had been good, if A. had given but two acres, or but one acre or less, yet forasmuch as all the three acres were given in exchange for the others, and the condition which was implied in the

[l] Cruise, Dig. tit. xxxii. c. 6.
[m] 1 Inst. 50.
[n] Touch. s. 295.
[o] Litt. s. 52.

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exchange was entire: upon the eviction of one acre, the condition in law was broken, and therefore an entry was given on the whole; as when the whole estate in part was evicted, the exchange was defeated; so when an estate of freehold for life, which was but parcel of the estate, was evicted, the exchange was defeated.[p]

Can only be between two parties.

For this last, among other reasons, there can only be two parties to an exchange. Littleton speaks of an exchange as of a transaction between two persons; and Mr. Hargrave says it was held in a late case, that an exchange in the strict legal sense of the word could not be between three parties, the principle of it not being applicable to more than two distinct contracting parties, for want of the mutuality and reciprocity on which its operation so entirely depends. For, first, the consideration of an exchange, and the implied warranty to it, is the receiving something with warranty from the same person to whom something with warranty is given; but if there could be three distinct parties, each would give to one and receive from another. Secondly, the implied condition of re-entry is, that it may be made on him whose title fails; but if there could be three parties to an exchange, then each person would be liable to re-entry for the fault of another's title as well as of his own; but, although there cannot be more than two distinct parties to an exchange, yet there may be more than two persons. Thus an exchange between two joint-tenants and two tenants in common, is good; for although four persons are named, yet they constitute only two distinct parties. The same observation applies to any number of persons, if so conjoined in the mutuality of giving and receiving in exchange, as to make only two distinct relative parties.[q]

Principles of exchange of lands similar to those of exchange of benefices.

We have mentioned here the above requisites in the exchange of lands, because, although not strictly and entirely applicable to the exchange of benefices, they are the foundation of all the law applicable to the latter case; and the same principles may be referred to as the safest guide in any questions that may arise, and that may not hitherto have been settled in the case of benefices exchanged.

License before treating for exchange of benefices..

Before an exchange of benefices can be made, it is necessary to procure a license from the ordinary to treat of an exchange; and it is then effected by an instrument in writing, whereby the parties agree to exchange their

[p] *Bastard's case*, 4 Rep. 121; 1 Inst. 173.
[q] 1 Inst. 50 b, n. 1; 1 Inst. 51 a, n. 1; Cruise's Dig. tit. xxxii. c. 6.

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benefices, and for that purpose resign them into the hands of the ordinary.[r]

In exchanges of land, we have seen that the estate in the lands exchanged must be of the same quantity; so in the case of benefices, both must be spiritual; for a lay preferment, as a hospital, cannot be exchanged, or go for a prebend or other spiritual benefice.[s] Both benefices must be spiritual.

And, by analogy to the case of lands, where it is necessary that there should be an execution by entry in the life of the parties, if one party be instituted and inducted, and the other only is instituted, and dies or refuses to finish, in this case, though they have proceeded so far, yet the resignation and all that followed upon it shall be void, and both, if living, may return to their former benefices on the foot of former possession; or, if one die before he is inducted, and after the induction of the other, this induction and all that went before shall be void, because the exchange was not fully executed during the lives of the parties:[t] and here we observe the analogy to the implied mutual warranty. Must be completed in the lifetime of the parties.

In every other case resignations must be made *purè, sponte, absolutè, et simpliciter*, to exclude all indirect bargains; but a resignation made in order to effect an exchange, is an exception, for that admits of the condition if the exchange shall take full effect, but not otherwise; the resignation, therefore, in such cases is not good and complete until the exchange is executed; if either party dies or refuses to complete the exchange, the resignation is a nullity, and it is as if it had never been made.[u] Resignation for the purpose of an exchange.

It follows necessarily from what has been here stated, that all exchanges, or agreements for exchange, between incumbents, without the knowledge and full authority of the ordinary, are illegal; or rather, there is no possible way in which such exchanges could be made with security to either party.

Exchanges, like other dealings with livings, may be simoniacal; and it is enacted, that if any incumbent of any benefice with cure of souls shall corruptly resign or exchange the same, or corruptly take, for or in respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money or other benefit whatsoever, as well the giver as the taker of any such pension, sum of money or other benefit corruptly, shall lose double the value of the sum so given, taken or had, half to the Simoniacal exchanges.

[r] Gibs. 863.
[s] Wats. c. 4; Gibs. 821.
[t] Gibs. 821; 2 Burn's E. L.
[u] See Chapter on Resignation.

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queen and half to him thall sue for the same in any of her majesty's courts of record.[x]

An exchange, therefore, must be made *simpliciter*; there must be no sum of money or other valuable consideration given for equality of exchange; and if the two benefices are not of equal value, he who takes the least valuable in exchange is precluded from receiving any compensation.

What would be so considered.

And so if the parties exchanging should import into the agreement for exchange, or otherwise enter into any contract to forego any of those rights and claims to which by law they would be entitled upon coming into possession of the exchanged benefice, as, for example, to waive all claim for dilapidations, this would, as it seems, be considered a corrupt and simoniacal exchange.[y] So that in an exchange of benefices, the different state of repair of the two houses of residence cannot easily be taken into consideration as an inducement for consenting to the exchange, for neither party could bind himself to give up that claim which the law allows to every clergyman who comes to dilapidated premises.

The question was discussed, and fully and satisfactorily settled, in the following recent case.

Claims made for dilapidations allowed after an exchange.

Two clergymen, possessed of respective incumbencies, agreed to exchange them, and the exchange was made with the consent of their respective patrons and diocesans; they accordingly resigned their benefices into the hands of their respective bishops, and were inducted into the exchanged benefices. There was no specific agreement entered into on the subject of dilapidations; but from the conduct of the parties at the time of, and for several months after, the period when the exchange was agreed and acted upon, it was plain that neither party then contemplated any claim for dilapidations, and it was not until a dispute arose upon another subject, that the plaintiff first mentioned his claim for dilapidations; shortly previous to which time there had been a statement of accounts between the plaintiff and defendant (the two clergymen), in which there was no mention of a claim for dilapidations.

The questions for the opinion of the court were, 1st, whether under the above circumstances there is sufficient evidence that the exchange was intended by the plaintiff and the defendant to be on the footing that each should take the living of the other in its then state and condition; 2dly, whether the law of England with respect to the dilapidations claimed by the successor to a spiritual

[x] 31 Eliz. c. 6.

[y] See post, judgment in *Downes* v. *Craig*, 9 Mee. & Wels. 166.

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preferment from his predecessor, applies under the above circumstances to the case of an exchange of preferments.

The points marked for argument on the part of the defendant, were as follows:—That the custom of England with respect to the liability of an incumbent to his successor for dilapidations, does not apply to the case of an exchange of livings, because a rector is a tenant for life, and the custom only differs from the ordinary law relating to the liability of tenants for life for waste, by allowing an action of waste to be brought by one party against another, without there having been any privity of estate between them, and also against the executor of the tort feasor, notwithstanding the principle of "*actio personalis moritur cum personâ;*" consequently the successor being in by his own contract, no action lies; at all events the injury, if any, being the result of and springing from a contract, and caused by the plaintiff's own act, an action of tort cannot lie: that the parties are not in merely by presentation and institution, but by contract, since if one had died before the induction of the other, or *vice versâ*, the institution and induction of the one would have been void. The defendant will also contend that a contract to exchange the livings in their then state and condition is found in point of fact by the case: that the statement and signature of the accounts between the parties, without reference to any claim for dilapidations, four months after the exchange, and two before any such claim, is conclusive evidence upon the subject: that therefore, according to the legal effect of an ordinary contract of exchange, and by the express terms of the present one, the defendant is entitled to have a verdict entered for him. This case was very fully argued; and Lord Abinger, C. B., in giving judgment, says, "It might be a very considerable question whether if a contract for the exchange of livings were made in writing, with an express declaration that neither party should sue the other for the dilapidations, if one party said, if you will admit me to your living I will admit you to mine, and I will make no claims for dilapidations, it would not amount to a simoniacal contract, and so would be void. At present I do not see that it makes any difference whether it be a contract with a party to resign in favour of another, or whether it be a contract for an exchange, which may possibly fail in the completion. But it is unnecessary in this case to pronounce a judgment on that point; for here the exchange was made and completed. Then the only question is, whether an agreement simply to exchange has necessarily and fairly

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engrafted upon it the condition that neither party shall be liable to the other for dilapidations. I see nothing to show that; and I do not see any consequence derived from the admitted contract to exchange and the exchange actually completed, operating against the right of the party entering to claim for dilapidations. The facts found in this case preclude the necessity of the court considering the effect of a positive agreement to that effect; there is no such agreement here; the parties have the same right as they would have in case of a presentation to a living, when it is clear that the plaintiff would have a right to claim for dilapidations against his predecessor. I think, therefore, that the judgment must be in his favour." The judgment of Parke, B., is to the same effect. "I entirely agree," he says, "in opinion with the lord chief baron. The first question is, whether there is in this case any agreement between the parties, that if the living were exchanged each should omit to sue the other, and, in effect, give up to the other any claim for dilapidations. The case finds that there was no specific agreement; and it would be very wrong to infer from the facts stated in the case, that there was such an agreement; and even if there were, I cannot help concurring in the doubt which has been expressed whether it would be valid and binding. It appears to me to savour of simony.

An agreement to forego such a claim would probably be simony.

"The next question is, whether, by law, the claim for dilapidations does not apply to a successor by exchange as well as to another. The law upon that subject is expressed in the written declaration of what was the common course in the olden times. In the case of *Wise* v. *Metcalfe*,[z] that declaration will be found to be the foundation of the judgment of the court; and it is extended to all rectors. It states, in effect, that all prebendaries, rectors, vicars, &c., shall be required to repair and support their parsonages, and so on, and to deliver them to their successor repaired and supported; and if they do not, they shall pay such a sum to their successors as shall be necessary for the reparation, or necessary re-edification of the house or building. That statement of the law applies to all successors of persons ceasing to possess the living. If they have permitted dilapidations, they are to pay to their successors so much as shall be necessary to put the rectory into a proper state of repair. Such being the law, there is no doubt the plaintiff was the successor of the defendant. It is said that it could not be known till the exchange was completed, whether he would be his successor: there can be

[z] 10 Barn. & Cres. 299; 5 Man. & Ryl. 235, 965.

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no doubt that it was a defeasible right to the living, until the other incumbent was inducted; but I do not think there can be any doubt, that when induction took place on his taking possession, he became the successor, and his predecessor became liable for the dilapidations. The circumstance of the right being defeasible, I do not think constitutes a defence; but it is unnecessary to decide that question here, because the other incumbent was inducted also. The case therefore appears to me to be clear on both points. It is found that there was no agreement between the parties that the one should give up the right to dilapidations as against the other, and there is no exemption to the operation of the general law applying to a case of mutual resignation, with a view to an exchange of livings."

Rolfe, B., says, "I am of the same opinion. Suppose, instead of an exchange, it had been an acceptance by the other party of the living, there is no doubt the common law right would have attached; and I see no ground for making the slightest difference. This is an acceptance of a living under a special contract, a case in which the law allows a contract, that, in consideration of one resigning his living, the other shall resign also. I do not enter into the argument as to what would be the law in the intermediate period between the first and second presentation. I think the same principle would still apply; but there is a great analogy between this and the exchange of land; the exchange may become wholly void by the death of one of the parties before the transaction is completed. Upon the whole, I entirely concur in the opinion which has been expressed, and particularly in the doubt intimated, whether an agreement to waive the claim for dilapidations would have been a valid agreement."[a]

Exchange of glebe lands.

An exchange of portions of glebe lands may be effected by incumbents, under the powers of and in the manner provided by some recent acts of parliament; such exchanges are of a different nature, and altogether distinct from those which we have been considering in the present chapter, and will be found fully treated in the section which has been devoted to that purpose.[b]

Section 4.

Of forming and dissolving Unions of Benefices.

Union, what it is.

Union is the uniting, consolidating, and combining two

[a] See the whole case of *Downs* v. *Craig*, 9 Mees. & Wels. 166.
[b] Ante, Book II. Chap. I. Sect. 4.

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churches into one, by which consolidation one of the benefices becomes extinct in law. And the principal reasons assigned for it by the canon law are for hospitality, nearness of the places, want of inhabitants, poverty, or smallness of the living.[c]

There appears to be some doubt whether, by the ancient common law, benefices might have been united and combined, or whether the fact of union or no union was a matter into which the common law courts could inquire.

In Lord Raymond's Reports, a case is referred to in which it is said, union was made *concurrentibus his quæ in hâc parte de jure requirebantur*; and exception was taken, that it was not said by whom the union was made; but it was answered that this was the act of a spiritual judge, and the common law would not examine it, no more than sentence of the spiritual court.[d]

Manner in which unions were formerly made.

Unions were made by the ordinary, patron and parson, or during vacancy by the two former; and in some cases the king's consent was also necessary. For where the churches were very poor, and consequently the king's interest in them very small, it appears that his consent was not deemed necessary: but if they were of reasonable value, it then became essential, because an advowson was a thing which lay in tenure, and might be held *in capite*, and therefore the king might be prejudiced in his ward; and secondly, he might be barred of a casual profit, as a lapse, which in probability might happen sooner where there were two churches than where there was but one; but yet the ordinary was the chief actor; and therefore, if the consent of the king was subsequent, it was sufficient.[e]

Whose concurrence necessary to an union.

Restraint of union by statute.

But it appears that previously to the 37th year of Henry VIII. the law was very uncertain as to what churches were poor enough to be united; which uncertainty gave occasion to the making of the statute in that year,[f] by which it was declared that an union or consolidation of two churches in one, or of a church and chapel in one, the one of them not being above the yearly value of 6*l.* in the king's books, and not distant from the other above one mile, may be made by the assent of the ordinary and ordinaries of the diocese where such churches and chapels stand, and by the assents of the incumbents of them, and of all such as have a just right, title, and interest to the patronages of the same churches and chapels, being then of full age; which unions and consolidations so made shall be good and available in

[c] Gibs. 920.
[d] Vide *Reynoldson* v. *Blake and the Bishop of London*, 1 Ld. Raym. R. 195.
[e] Ibid. [f] 37 Hen. 8, c. 21.

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the law, to continue for ever, in such manner and form as by writing or writings under the seal of such ordinaries, incumbents, and patrons, shall be declared and set forth.

Provided, that where the inhabitants of any such poor parish, or the more part of them, within one year next after the union or consolidation of the same parish, by their writing sufficient in the law, shall assure the incumbent of the said parish for the yearly payment of so much money as, with the sum that the said parish is rated and valued at in the court of first fruits and tenths, shall amount to the full sum of 8*l.* to be levied and paid yearly by the said inhabitants to the said incumbent and his successors, all such unions or consolidations made of any such poor parish as aforesaid, shall be void and of none effect.

This statute gave jurisdiction to the common law courts.

According to the case in Lord Raymond's Reports, it was the making of this statute which gave jurisdiction to the common law to examine if unions were well made, as marriages, it is there observed, though they were originally *alterius fori*, yet when the act of parliament meddled with them, it gave jurisdiction to the temporal judge; and therefore the common law took so far notice of unions after the act, that the judges granted a prohibition to the spiritual court for suing the parishioners to come to church upon an union where the union was void. But as this act was in the affirmative only, and not in the negative, that is to say, sanctioning in some cases but not restraining in others, it was held, in a case in the temporal courts,[g] that unions might still have been made at common law of churches of greater value than that mentioned in the act. But this seems to have been a doubtful case, and there was a difference of opinion in the judges upon it; nor is it easily reconcilable with what has been said before, that the common law derived its jurisdiction in these matters from the statute.

Unions in cities and corporate towns formerly.

In the seventeenth year of Charles II.[h] another statute was passed, which provided for the union of churches in cities and corporate towns; and it was declared that, in case of such unions, the parishioners and inhabitants should pay such tithes and other duties as had belonged to the incumbent of the united church to the incumbent of the church to which it was united and annexed; but that, notwithstanding such union, each of the parishes so united should continue distinct as to all rates, taxes, &c., and that churchwardens should be elected and appointed for each parish as before. By union, the one church became extinct; and of the two benefices, the more worthy was retained; or it rather seems to have been con-

Effect of the union on the advowson.

[g] *Austin* v. *Twyne*, Cro. Eliz. 500. [h] 17 Car. 2, c. 3.

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sidered that both the old churches were extinguished, for that the church united was a new thing created, not the ancient rectory or vicarage of either retained, but *novum aliquid tertium*, composed of both. Thus, though the advowson of one of the united churches might have been appendant, yet the appendancy would have been destroyed by the union, for appendancy consists wholly in prescription, whereas the beginning of the new church and the advowson would be well known; and to make a new church appendant would be in effect to make that which is done at this day to be done long ago.[1]

The advowson therefore of a church which has been united is necessarily an advowson in gross, and the patronage would go on every second turn to the several former patrons, or in any other manner upon which they might agree; but they could not by agreement create an appendancy.

It has been said patrons of united churches have several rights, and that their possessions are also several, so that the one might usurp upon the other and drive him to his *quare impedit;* that tenants in common of an advowson have several rights but joint possessions; that coparceners of advowsons have several rights but possessions partly joint and partly several; but that patrons of united churches have both rights and possessions several; consequently that their writ of right ought to be *de medietate advocationis.*[k]

In the same case from which the above is quoted it is said of the operation of an union, that it was generally made in time of vacancy of the church; for if the church was full, the act of the ordinary could not prejudice the incumbent, for by the union the incumbency would be destroyed; therefore if the church was full, the consent of the incumbent was necessary. But if the church was full, and the incumbent would not consent, the union could not be made *de verbis in præsenti;* but it might be made *de verbis in futuro, quando vacaverit.* And after the union the ordinary might compel the parishioners to come to the church to which the union was made, and to pay their tithes by process in his court, and no prohibition was grantable; and this was no prejudice to the parishioners, because their *modus* continued good; but the parish, as to taxes, duties, rates, reparations of the church, &c. continued distinct. The reparations must be several, for otherwise it might be prejudicial to the parishioners, because

Union might be made prospectively.

Repairs in case of unions.

[1] 1 Lord Raym. 198. [k] Ibid.

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the old church might be much less in proportion than the new.

But it was considered unfair that the reparation should be separate where one of the churches was altogether extinguished, because in such a case the parishioners of the extinct church became discharged of all repairs; and it was therefore enacted by the stat. 4 Will. III. c. 12, that where one of the churches united under the 17 Car. II. c. 3, before mentioned, is at the time of such union or shall afterwards be demolished, in such case, as often as the church which is made the church presentative, and to which the union was made, shall be out of repair, or there shall be need of decent ornaments for the performance of divine service therein, the parishioners of the parish whose church shall then be down or demolished shall bear and pay towards the charges of such repairs and decent ornaments such share and proportion as the archbishop or bishop that shall make such union shall by the same union direct and appoint; and for want of such direction and appointment, then one-third part of such charges of the repairs and decent ornaments which shall be made or provided; and the same shall be rated, taxed and levied, and in default thereof such process and proceedings shall be made as if it were for the reparation and finding decent ornaments for their own parish church if no such union had been made.

Land tax on united livings.

In cases where one living has been united to another, and the lands of one such living sold to redeem the land tax on both, such sales shall be confirmed; and all such sales hereafter to be made for such purpose shall be as valid as if made merely for redeeming the land tax charged on the land of the living, the land belonging to which has been so sold, and as if such living had not been united to any other living; but in case any consolidated livings, the land tax charged on which hath been or shall be so redeemed, shall at any time become disunited and held by different incumbents, the incumbent of the living, the land whereof was sold to redeem the land tax on both, shall be entitled to an annual rent charge issuing out of the other, equivalent to the land tax charged on it.[l]

Repeal of the old law.

The two statutes here mentioned, of the 37 Hen. VIII. c. 21, and the 17 Car. II. c. 3, have been recently repealed, and the manner of forming unions of benefices has been provided for, and is now entirely regulated by the 1 & 2 Vict. c. 106;[m] and it is moreover by that act declared that it shall not be lawful to make unions of benefices in any

[l] 53 Geo. 3, c. 123, s. 26.

[m] Benefice Pluralities Act.

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All unions henceforth are to be as after mentioned.

other manner than according to the provisions therein contained; and that if any union shall be made in any other form or manner or under any other circumstances, the same shall be void to all intents and purposes: and as that statute prescribes several particulars, the omission of any of which, as it seems, would make the union void, it has been thought best to retain its language here without any attempt at abbreviation.

Unions under 1 & 2 Vict. c. 106.

Acts to be done by the archbishop of the province.

"Whenever it shall appear to the archbishop of the province, with respect to his own diocese, and whenever it shall be represented to him by the bishop of any diocese, or by the bishops of any two dioceses, that two or more benefices, or that one or more benefice or benefices, and one or more spiritual sinecure rectory or rectories, vicarage or vicarages, in his or their diocese or dioceses, being either in the same parish or contiguous to each other, and of which the aggregate population shall not exceed 1050 persons, and the aggregate yearly value shall not exceed 500*l*., may, with advantage to the interests of religion, be united into one benefice, the said archbishop of the province shall inquire into the circumstances of the case; and if on such inquiry it shall appear to him that such union may be usefully made, and will not be of inconvenient extent, and that the patron or patrons of the said benefices, sinecure rectory or rectories, vicarage or vicarages respectively, is or are consenting thereto, such consent being signified in writing under the hands of such patron or patrons, the said archbishop shall, six weeks before certifying such inquiry and consent to her majesty as after directed, cause, with respect to his own diocese, a statement in writing of the facts, and in other cases a copy in writing of the aforesaid representation, to be affixed on or near the principal outer door of the church, or in some public and conspicuous place in each of such benefices, sinecure rectories or vicarages, with notice to any person or persons interested that he, she, or they may, within such six weeks, show cause in writing under his, her, or their hand or hands, to the said archbishop, against such union; and if no sufficient cause be shown within such time, the said archbishop shall certify the inquiry and consent aforesaid to her majesty in council; and thereupon it shall be lawful for her majesty in council to make and issue an order or orders for uniting such benefices, sinecure rectory or rectories, vicarage or vicarages, into one benefice with cure of souls, for ecclesiastical purposes only; and it shall be lawful for her majesty in council to give directions for regulating the course and succession in which the patrons, if there be

Benefices to be united by order of the queen in council.

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more than one patron, shall present or nominate to such united benefice from time to time as the same shall become vacant, and for determining, if such united benefice shall be in two dioceses, to which of such dioceses such benefice shall belong; and such order or orders shall be registered in the registry or registries of the diocese or respective dioceses to which such united benefice shall be determined to belong, and to which either or any of the united benefices, sinecure rectories or vicarages shall have belonged when separate; which order or orders the registrar or registrars of such diocese or respective dioceses, immediately on the receipt thereof, are by the act required to register accordingly; and such order or orders shall thenceforth be binding on all parties whatsoever; and if at the time of the registration of such order or orders all the benefices, sinecure rectories or vicarages ordered to be united shall not be holden by the same incumbent, then if any of such benefices, sinecure rectories or vicarages shall at such time be vacant, and if not, then upon every avoidance, until all the said benefices, sinecure rectories or vicarages but one shall come to be holden by the same incumbent, the patron of the vacant benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, shall be bound to present or nominate, and the bishop shall be bound to admit and institute or license to the vacant benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, the incumbent of the other or one of the other benefices, sinecure rectory or rectories, vicarage or vicarages so ordered to be united; and if both or all, as the case may be, shall be holden by the same incumbent at the time of the registration of such order or orders, or all but one of the said benefices, sinecure rectories or vicarages shall at such time be vacant, then immediately, or otherwise on the first avoidance of either or any of such benefices, sinecure rectories or vicarages, after all but one shall have come to be holden by the same incumbent, the said benefices, sinecure rectory or rectories, vicarage or vicarages, shall become permanently united together, and shall be and be deemed and taken to be one benefice with cure of souls to all intents and purposes, unless and until the same shall be afterwards disunited, as after mentioned: provided that notwithstanding any such union the parishes or places of which such united benefice shall consist shall continue distinct as to all secular rates, taxes, charges, duties and privileges, and in all other respects except as herein before specified."[n]

May be united prospectively.

Regulations in such cases.

As to ecclesiastical purposes only.

[n] 1 & 2 Vict. c. 100, s. 16.

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Glebe lands may be excepted out of an united benefice to augment the provision for any adjoining benefice.

When it shall further appear to the archbishop of the province, with respect to his own diocese, or it shall be further represented to him by the bishop of any other diocese, that the total income of any benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, proposed to be united as aforesaid, would be larger than sufficient for the due maintenance and support of the incumbent of the benefice when united, and that the whole or some specified part or parts of the glebe lands, tithes, rent charges, tenements and hereditaments belonging to the benefice or benefices, sinecure rectory or rectories, vicarage or vicarages proposed to be united, or any of them, might and could, with advantage to the interests of religion, be excepted out of such union, and be exchanged for certain other lands, tithes, tenements and hereditaments, or any of them, in some other specified benefice situate in the same diocese, and having no competent provision belonging thereto; and that the lands, tithes, tenements or hereditaments proposed to be given in exchange for such excepted lands, tithes, rent charges, tenements or hereditaments, might with like advantage be granted, conveyed and assured, as a further perpetual endowment for the incumbent of such last-mentioned benefice; and that the patron or patrons of the said benefice or benefices, sinecure rectory or rectories, vicarage or vicarages respectively, and the incumbent or incumbents for the time being thereof respectively, or of such thereof as shall not be then vacant, and the owner or owners, impropriator or impropriators of such lands, tithes, tenements or hereditaments respectively, so proposed to be given in exchange, is or are consenting thereto, such consent to be signified in writing under their respective hands, it shall be lawful for the said archbishop, after inquiring into such further matter, to certify in like manner as aforesaid such further circumstances to her majesty in council; and thereupon it shall be lawful for her majesty, in and by such order as aforesaid, or any other order or orders, to direct that such first-mentioned lands, tithes, rent charges, tenements and hereditaments, shall be excepted out of such united benefice, and be granted, conveyed and assured unto such owner or owners, impropriator or impropriators as aforesaid, in exchange for an equal value of lands, tithes, tenements or other hereditaments, situate or arising within the limits of such benefice, to be by such owner or owners, impropriator or impropriators, granted, conveyed and assured for the further endowment of such other benefice; and such order or orders shall be registered in the

This may be effected by exchange, so that the lands, &c. may be within the limits of the augmented benefice.

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register of the diocese to which such united benefice and other benefices shall belong, and which order or orders the registrar of such diocese, immediately on the receipt thereof, is by the act required to register accordingly, and such order or orders shall thenceforth be binding on all parties whatsoever; and such lands, tithes, tenements and hereditaments, so directed to be granted, conveyed and assured to such owner or owners, impropriator or impropriators as aforesaid, shall, immediately upon and after the execution and enrolment, in manner hereinafter directed, of the deed or deeds, instrument or instruments, hereinafter mentioned, be for ever freed and discharged of and from all estate, right, title and interest whatsoever of all and every the incumbent or incumbents for the time being of the said benefices, sinecure rectory or rectories, vicarage or vicarages, so to be united, and become and be subject and liable in every respect to all and singular the uses, trusts, estates and charges of or to which the lands, tithes, rent charges, tenements, or other hereditaments, so granted, conveyed or assured by such owner or owners, impropriator or impropriators, for such further endowment as aforesaid, may at the time of such execution have been subject or liable; and such last-mentioned lands, tithes, rent charges, tenements, or other hereditaments, so granted, conveyed and assured by such owner or owners, impropriator or impropriators, for such further endowment as aforesaid, shall in like manner become and be for ever annexed to such other benefice, for the further endowment of which the same should be so granted, conveyed and assured, and be held and enjoyed for ever by the incumbent for the time being thereof, as part of the endowment thereof, freed and discharged of and from all uses, trusts, estates and charges whatsoever, to which the same respectively, or any part thereof, were or was before subject or liable.[o]

Directions as to the deed of exchange.

All such grants, conveyances and assurances as aforesaid shall be made by a deed or instrument in writing, under the hand and seal, or hands and seals of the patron or patrons of the benefice or benefices, sinecure rectory or rectories, vicarage or vicarages affected thereby, and of the owner or owners, impropriator or impropriators of the lands, tithes, tenements and hereditaments, so to be given in exchange as aforesaid; and the bishop of the diocese for the time being shall testify his approval thereof by being a party and affixing his episcopal seal thereto; and the incumbent or incumbents for the time being of such

[o] Sect. 17.

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of the said benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, as shall not be then vacant, shall testify his or their approval by being a party or parties to, and signing the same respectively, and shall be the party or parties by whom the grant, conveyance and assurance, to be made or executed to such owner or owners, impropriator or impropriators as aforesaid, shall be made and executed; and such deed or deeds, instrument or instruments in writing, shall be enrolled in her majesty's High Court of Chancery within six calendar months after the execution thereof respectively, or else have no operation under the act.[p]

Must be enrolled in Chancery.

Effect of the approval of the bishop.

The approval of the said bishop, testified as aforesaid, shall be conclusive that the lands, tithes, rent charges, tenements and hereditaments, so to be granted, conveyed and assured under or by virtue of the provisions aforesaid, were respectively of the proper value required by the act, and were respectively granted, conveyed and assured in due accordance with the provisions aforesaid.[q]

Disuniting benefices that have been united.

The same statute further provides for disuniting benefices which have at any former time been united, or which may at any time have been united under the last-mentioned provisions, in cases where it may be deemed expedient so to do. The manner in which such disunions are to be effected is as follows.

Mode of proceeding in.

When two or more benefices shall have been united or may be hereafter united into one benefice, and, with respect to his own diocese, it shall appear to the archbishop of the province, or the bishop of any diocese shall represent to the archbishop that one or more of the benefices within his diocese, of which such united benefice shall consist, may be separated therefrom with advantage to the interests of religion, the archbishop shall inquire into the circumstances of the case, and if on such inquiry it shall appear to him that such union may be usefully dissolved, so far as respects such benefice or benefices, he shall, six weeks at least before certifying such inquiry to her majesty as hereinafter directed, cause, with respect to his own diocese, a statement in writing of the facts, and in all other cases a copy in writing of the aforesaid representation to be affixed on or near the principal outer door of the church, or in some public and conspicuous place in each of the benefices, forming part of the united benefice, with notice to any person or persons interested, that he, she or they may within such time show cause in writing, under his, her or their hands, to the archbishop, against

[p] Sect. 18. [q] Sect. 19.

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any such disunion; and if no sufficient cause be shown within such time, the archbishop shall certify the inquiry and consent, when the patron's consent is necessary, to her majesty in council, and thereupon it shall be lawful for her majesty to issue an order for separating such last-mentioned benefice or benefices from such united benefice, and for declaring the rights of patronage of the several patrons, if there be more than one patron, and such order shall be registered in the registry of the diocese to which such united benefice shall belong, which order the registrar of such diocese, immediately on the receipt thereof, is hereby required to register accordingly; and thereupon immediately, if such united benefice shall be then vacant or otherwise, on the first avoidance thereof, such union shall be *ipso facto* dissolved, so far only as regards such benefice or benefices so proposed to be separated from such united benefice, but in all other respects shall remain in full force and effect, and thenceforward such last-mentioned benefice or benefices shall be, and be deemed and taken to be, a separate and distinct benefice or benefices, to all intents and purposes whatever, as if no such union had taken place, and the patron or patrons thereof shall and may, according to the terms of such order, present or nominate thereto respectively, and so from time to time upon each and every avoidance of the same: provided, that no benefices which have been united for more than sixty years before the passing of this act shall be disunited without the consent in writing of the patron or patrons thereof.[r]

Incumbent may resign a disunited benefice, and patron may present.

In any case in which her majesty in council shall have issued any such order as aforesaid for separating one or more benefices from such united benefice, it shall be lawful for the incumbent thereof, if such united benefice shall be full at the time of issuing such order, to resign the benefice or benefices so proposed to be separated as aforesaid from such united benefice; and thereupon it shall be lawful for the respective patron or patrons of such last-mentioned benefice or benefices to present or nominate thereto, in the same manner as if such united benefice had been vacant at the time of issuing such order.[s]

Portion of glebe, &c. may be assigned to each of dissevered benefices.

Whenever two or more benefices, which have at any time been united into one benefice, shall be disunited and become separate benefices under the provisions of this act, whether the order for disunion shall extend to the whole number of benefices of which such united benefice consisted, or to one or more of such benefices only, it shall be

[r] Sect. 21. [s] Sect. 22.

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lawful for her majesty in council, on the recommendation of the archbishop of the province, with the consent of the patron or patrons of such benefices respectively, (such consent to be signified in writing under the hands of such patron or patrons,) to assign and attach such portion of the glebe lands, tithes, moduses, rent charges, or other endowments or emoluments belonging to, or arising or accruing within the limits of such united benefice, to each of such benefices respectively, as to her majesty in council shall seem fit, notwithstanding such proportion of glebe lands, tithes, rent charges, moduses, or other endowments or emoluments, or any part thereof, may not arise or accrue within the limits of the benefice to which the same shall be be so assigned and attached as aforesaid, or may not have belonged thereto, and also to divide and apportion between such benefices all such charges and outgoings as before the disunion thereof were imposed upon the whole united benefice; and in the case of mortgages, with the consent of the mortgagees, in writing under their hands and seals.[t]

And shall belong to the incumbent.

And all such lands, tithes, rent charges, moduses, or other endowments or emoluments, when so assigned and attached as aforesaid, shall belong to, and the same and the rents and profits thereof shall be recoverable by, the incumbent of the benefice to which the same shall have been so assigned and attached.[u]

House of residence may be sold, and the proceeds applied to building other houses.

In case it should happen that in benefices thus disunited the existing house of residence may be inconveniently situated for either of such disunited parishes, or may be on too large and expensive a scale to be conveniently maintained by the incumbent of such disunited benefice, it is enacted that all the provisions of an act which has been already mentioned and explained, for amending the law for providing fit houses for the beneficed clergy, shall be applicable to the case of any benefice thus disunited; so that the house and gardens, &c. may in such case be sold, and the proceeds of the sale may be applied by the governors of Queen Anne's Bounty towards the erection or purchase of such and so many houses, or in and towards the purchase of so many gardens or appurtenances, or of so much land as shall be required for the residence of an incumbent within each of the parishes so disunited, in such proportions within each such benefice respectively as shall be approved by the archbishop of the province, with the consent of the patron and ordinary, and (if the benefice be full) of the incumbent of the benefice, such consents to

[t] Sect. 23. [u] Sect. 24.

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be signified in writings under their respective hands, and shall be confirmed by her majesty in council.[x]

Supplemental order for adjusting disputes may be made within five years.

In case it should happen that, at the time when any orders for the uniting or disuniting benefices comes into operation, the changes effected by virtue of the above provisions may create doubts and disputes not foreseen at the time when such orders may have been made respecting ecclesiastical jurisdiction, glebe lands, tithes, rent charges, and other ecclesiastical dues, rates and payments, patronage, right to pews, and the definition of local boundaries, it is enacted, that it shall be lawful for her majesty in council, at any time within five years after such orders respectively shall come into full operation, if occasion shall arise, to make a supplemental order for removing such doubts, and settling such disputes; and every such supplemental order shall have the same force and effect as if it had formed part of the original order made under the provisions of this act: provided that in every case in which the contents of parishes shall be so altered, such alteration shall not in any way affect the secular rates, taxes, charges, duties or privileges of such parishes, or of any part of them.[y]

By the above statute, according to the provisions of which the union and disunions of parishes are to be made, power is also given for annexing isolated places which are separated from the parish or mother church to other parishes to which they may be more contiguous, or for forming such places into separate parishes for ecclesiastical purposes; but as to this latter, it appears to have been forgotten that the church building acts contain ample provisions for effecting precisely the same purpose. As to the former, however, the provisions of this act may probably be very usefully had recourse to. Such provisions are as follows.

Whenever, with respect to his own diocese, it shall appear to the archbishop of the province, or when the bishop of any diocese shall represent to the archbishop that any tithing, hamlet, chapelry, place or district within the diocese of such archbishop, or the diocese of such bishop, as the case may be, may be advantageously separated from any parish or mother church, and either be constituted a separate benefice by itself, or be united to any other parish to which it may be more conveniently annexed, or to any other adjoining tithing, hamlet, chapelry, place or district, parochial or extra-parochial, so as to form a separate pa-

[x] Sect. 26. [y] Sect. 27.

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rish or benefice; or that any extra-parochial place may with advantage be annexed to any parish to which it is contiguous, or be constituted a separated parish for ecclesiastical purposes; and the said archbishop or bishop shall draw up a scheme in writing (the scheme of such bishop to be transmitted to the said archbishop for his consideration), describing the mode in which it appears to him that the alteration may best be effected, and how the changes consequent on such alteration in respect to ecclesiastical jurisdiction, glebe lands, tithes, rent charges, and other ecclesiastical dues, rates and payments, and in respect to patronage, and rights to pews, may be made with justice to all parties interested; and if the patron or patrons of the benefice or benefices to be affected by such alteration shall consent in writing under his or their hands to such scheme, or to such modification thereof as the said archbishop may approve, and the said archbishop shall, on full consideration and inquiry, be satisfied with any such scheme or modification thereof, and shall certify the same and such consent as aforesaid by his report to her majesty in council, it shall be lawful for her majesty in council to make an order for carrying such scheme, or modification thereof, into effect; and such order, being registered in the registry of the diocese, which the registrar is by the act required to do, shall be forthwith binding on all persons whatsoever, including the incumbent or incumbents of the benefice or benefices to be affected thereby, if he or they shall have consented thereto in writing under his or their hands; but if such incumbent or incumbents shall not have so consented thereto, the order shall not come into operation until the next avoidance of the benefice by the incumbent objecting to the alteration, or by the surviving incumbent objecting, if more than one shall object thereto; and in such case the order shall forthwith, after such avoidance, become binding on all persons whatsoever.[s]

[s] Sect. 26.

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CHAPTER III.

OF THE MANNER IN WHICH A BENEFICE, OR THE PROFITS THEREOF, MAY BE LOST.

SECTION 1.

Of Sequestration.

A WRIT of *fieri facias de bonis ecclesiasticis* is a writ which may be sued out to the bishop of the diocese, when to a common writ of *fieri facias* the sheriff has returned that the defendant is a beneficed clerk, not having any lay fee; for these *bona ecclesiastica* are not to be touched by lay hands. And the bishop, or, in practice, the registrar of the diocese, thereupon sends out what is called a sequestration of the profits of the clerk's benefice, directed sometimes to the churchwardens, or very commonly, as matter of convenience, to the creditor at whose suit the writ has issued, or it may be to any other person, (for the bishop is not restricted in this respect,) directing them to collect the profits, and to pay them to the plaintiff, till the full sum be raised. The following is the form in which the writ of sequestration runs: What it is.

"We, therefore, proceeding by virtue of and in obedience to the said writ, and inasmuch as in us lies duly executing the same, have sequestrated all and singular the tithes, fruits, profits, oblations, obventions, and all other ecclesiastical rights and emoluments of and belonging to the rector (or 'vicar'), and by these presents do sequester the same, and give and grant unto you the said E. F. full power and authority to sequestrate, collect, levy, gather, and receive all and singular the tithes, fruits, profits, oblations, obventions, and all other ecclesiastical rights and emoluments of and belonging to the rectory (or 'vicarage') and parish church of —— aforesaid, and the same to sell and dispose of, and the money arising therefrom to apply to and for the due payment of the debt and costs in the said writ mentioned, subject to the said indorsement on the said writ; also subject, &c." [a] Form of the writ.

Instead of a *fieri facias*, the plaintiff may sue out a writ of *sequestrari facias*, directed, tested, and returnable, &c.

[a] See note to *Waite* v. *Bishop*, 1 Cromp. Mees. & Rosc. 607.

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as the *fieri facias;* commanding the bishop to enter into the rectory, and take and sequester the same, and hold them until of the rents, tithes, and profits thereof, and of the other ecclesiastical goods of the defendant, he have levied the plaintiff's debt. This writ is in the nature of a *levari facias*, the other is in the nature of a *fieri facias*.[b]

This is the mode of sequestrating where the sequestration is for satisfaction of a debt; but a sequestration is also very commonly a punishment or sentence pronounced by the bishop in his own court; and in that case it issues originally from the bishop.

Two kinds of sequestrations.

Sequestrations may, therefore, be considered of two kinds; first, such as issue at suit of a creditor, being founded on the return made by the sheriff, and where the bishop acts ministerially in aid of the sheriff; and, second, such as issue as an ecclesiastical sentence or punishment, and where the bishop acts originally.

Publication of.

The sequestration, when made out, should forthwith be duly published, which was formerly done by reading it in church during divine service, and afterwards at the church door,[c] but now, by fixing a copy of it on the church door;[d] and the power of sequestration only operates from the time of publication, and not earlier; so that any profits which may have accrued before the publication cannot be taken by virtue of it;[e] and if other sequestrations were taken out, that which was first published would have priority.[f]

Sequestrator.

The sequestration having been thus published, the duties of the sequestrator begin. The sequestrator may be any person whom the bishop thinks proper to appoint for that purpose; and he is the bishop's officer, or, as Lord Stowell calls him, his bailiff. For the sake of convenience, this is very commonly the creditor; but if the creditor is appointed, he has no greater authority or power in consequence than an indifferent third party would have.[g]

His duties.

His duties are easily understood. He is in the first place to consider himself in the same position as the incumbent of the benefice would have been, as to all charges and outgoings, which it would be the duty of the incumbent to provide for; since the profits of a benefice can never be correctly said to belong to the incumbent absolutely, being to be appropriated first to certain purposes for the benefit of the parishioners and their church, and

[b] See Chitty's Pract. 788.
[c] 6 Barn. & C. 630.
[d] See 1 Vict. c. 45.
[e] *Waite* v. *Bishop*, ante.
[f] *Bennett* v. *Apperley*, 6 Barn. & C. 626.
[g] *Whinfield* v. *Watkins*, 2 Phill. 8.

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the residue only to be the property and for the benefit of the incumbent: a sequestrator, therefore, cannot be in a better position.

A demand having been made against a sequestrator for dilapidations, the sequestrator answered that he was ready to produce his vouchers for what he had paid, part of which he had expended in repairs. Lord Stowell directed the account to be furnished, but said, upon the general principle, he was inclined to hold that the sequestrator would be liable for dilapidations; for that although the sequestration may not mention any particular purpose but payment of the particular debt, yet it was a thing incident to and inseparable from the subject-matter itself, that there should be certain charges and duties for which the sequestrator would be bound to provide. The instrument, he adds, which is issued under the authority of the bishop, contains an allowance of all necessary charges; and the clergyman is by law equally required to provide such repairs, as well as the performance of divine service, and he cannot exonerate himself from one of those duties more than from the other.[h] And in another case the same learned judge says to the same effect. **Must repair, and is liable for dilapidations.**

A sequestrator is bound to repair edifices belonging to the benefice, and he may be compelled to do so by process from the bishop's court; the repair of the house is as necessary a charge as the supply of the church itself; the sequestrator may therefore be compelled by the bishop or churchwardens to make those repairs, and nothing can exonerate him from them.[i]

Besides paying all these charges to which the incumbent would have been liable, the sequestrator must, out of the accruing profits, provide for the proper service of the church; and this is regulated by the bishop, both as to the person who is to perform such service, and the amount of salary he is to receive, the sequestrator having only to pay such sum as may be directed.[k] **Must pay for the performance of service.**

After payment of all these necessary charges, the sequestrator is to collect the growing profits, to be paid over to him in whose favour the writ is issued, until the amount of the sum for which the benefice has been sequestrated has been satisfied.[l] **Ultimate trust of profits.**

Where upon the death of an incumbent whose living had been under sequestration, and who had been discharged under the Insolvent Debtors' Act, a balance remained in the registry of 81*l.*, this was claimed by a

[h] *Hubbard* v. *Beckford*, 1 Cons. R. 307.
[i] *Whinfield* v. *Watkins*, ante.
[k] 1 Cons. R. ante.
[l] 2 H. Black. 582.

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builder who had done repairs, by the succeeding rector for dilapidations, and by the assignee under the Insolvent Act.

A reasonable allowance out of the profits is usually made to the sequestrator according to the trouble he may be put to in the collection of the profits of the benefice. Dr. Burn also says that a reasonable allowance out of the profits is to be made for the maintenance of the incumbent and his family (in case there is an incumbent), if he has not otherwise sufficient to maintain them.

Remedies by.

Sequestrators cannot maintain an action for tithes in their own name at the common law, nor in any of the king's temporal courts, but only in the spiritual court, or before the justices of the peace, where they have power by law to take cognizance.[m]

Remedies against.

When the debt has been satisfied, the sequestrator is to deliver up his charge, and give an account of the due application of the sums which he may have received, which if they refuse to do, or if the accounts rendered by them are not satisfactory, the remedy of the incumbent is in the Ecclesiastical Court. But if the sequestrator, being called to account in that court, can show that the sequestration is finished and determined, and that the accounts have been made up, Lord Stowell says he may not be liable there, but may be liable elsewhere, as it did not seem to him that that court could interfere after the sequestration was closed, and the connection of the sequestrator with the living has ceased.[n]

If the sequestrators, being called to account in the Ecclesiastical Court, delay to give an account, it is said by Watson, the judge useth to deliver to the party grieved the bond given with a warrant of attorney to sue for the penalty thereof, to his own use, at the common law.[o] The bond is given to the bishop, and there appears to be no positive objection to his delivering over the bond to the incumbent in this manner and for this purpose.

It is said that in one case a bill in equity was filed for an account of profits received by sequestrators, that it was objected that the bishop ought to have been made a party, since the sequestrator is accountable to him for what he receives; but there the case was withdrawn.[p] But if the sequestration were still in force, and the question was simply one of account as against the sequestrator, a bill in equity would not appear to be proper, as the sequestrator is the bailiff of the bishop, to whom he is bound to

[m] Johns. 122; 3 Burn's E. L. 340.
[n] *Whinfield* v. *Watkins*, ante.
[o] Wats. ch. 30.
[p] See 3 Burn's E. L. 340.

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account; and the question in such a case, relating solely to ecclesiastical revenues, should be determined in the Ecclesiastical Court. But where, although the subject is ecclesiastical revenue, yet the question in dispute arises between different parties laying claim to the profits, there a bill in equity may be, and frequently has been, resorted to for the purpose of determining the priority of such claims. And it has been there decided, that a creditor who has obtained a sequestration cannot thereby defeat the claims of any prior incumbrancer on the profits. For that where a creditor of a clergyman seeks to obtain payment of his debt by judgment and sequestration, he is, in the contemplation of that court, in the same state as any other creditor who has taken out execution; and a creditor, having taken out execution, cannot hold property against an estate created prior to his debt.[q]

Disputes as to priority of claims, where there have been sequestration and other incumbrances.

Where a clergyman had, by indenture, assigned his stipend for a term of ninety-nine years for securing payment of an annuity; the annuity became in arrear, and the assignee of the stipend then gave notice of the assignment to the parties by whom the stipend was collected. Before that time, but subsequent to the assignment, the rector had incurred a debt to another party, by whom the stipend had been sequestered. Upon bill filed by the assignee of the stipend, it was decreed that he was entitled to receive satisfaction for the arrears and growing payments of his annuity prior to the claims of the subsequent creditors, who had taken out sequestration.[r] And so in a similar case, where the plaintiff had an assignment by indenture of the profits of the living for a term of years to secure an annuity granted to him by the rector, but a sequestration had been obtained by subsequent creditors, a receiver was appointed on the plaintiff's application, and an injunction was granted to restrain the bishop from commencing or prosecuting any proceeding in respect of the matters, and to restrain the other defendants from putting in force the sequestration obtained by them.[s]

The principle of these cases has been followed in other cases subsequently, and the principle appears very clear and satisfactory, namely, that sequestration being only a means of enforcing a claim, cannot entitle the person obtaining it to have his claim preferred to that of other parties who have an actual legal claim and prior incumbrance on the property; so that a sequestration can never oust a

[q] *White* v. *Bishop of Peterborough*, 3 Swanst. 116.
[r] *Errington* v. *Howard*, 1 Ambl. 485.
[s] *Silver* v. *Bishop of Norwich*, 3 Swanst. 112.

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legal assignment of the profits of a living made previously. If the parties therefore come into equity, a reference to the master would be directed, to take an account of the incumbrances, and to ascertain their respective priorities.[t]

Or where there has been more than one sequestration.

Upon the same principle it is, that when more than one sequestration has been granted, which is very frequently the case, the several parties in whose favour they have been obtained, are considered in equity just in the same manner as where there are several mortgagees of the same property. For as any subsequent mortgagee may redeem those whose mortgages are prior to his own, so those in whose favour any subsequent sequestrations have been granted, are entitled to an account in equity, as against those in whose favour prior sequestrations have been granted, whose debts they might satisfy if they pleased; or the sequestrator in possession may be directed to pass his accounts annually before the master, and becomes an officer of the court, being, as it were, made a trustee for the different parties, to whom he is to pay the profits according to their respective priorities.[u]

In a case at law, where a judgment was upon a warrant of attorney for 1800*l.*, the warrant of attorney provided that on the death of the defendant, and full payment of the arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a *sequestrari facias* thereupon, it appeared that at that time the former creditor had, by sequestrations, levied more than 1800*l.* for arrears of his annuity, and there were arrears still due. The court ordered that satisfaction should be entered on the roll of the former judgment as of the date when the judgment was signed by the second creditor, and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1800*l.* levied before the signing of his judgment.[x]

Bankruptcy and insolvency of clergyman.

A clergyman who has traded, so as to render himself liable in other respects to be made a bankrupt, is not exempt from his liability to a commission by reason of his character as a clerk in holy orders. He may also take the benefit of any of the acts for the relief of insolvent debtors.[y] And in either of these cases his private property would pass to his assignees in the same manner as

[t] *White* v. *Bishop of Peterborough*, ante.
[u] *Caddington* v. *Withy*, 2 Swans. 174.
[x] *Cattle* v. *Warrington*, 5 Barn. & Ad. 447.
[y] *Ex parte Meymott*, 1 Atkins. 196; and Lord Alvanley in *Arbuckle* v. *Cowtan*, 3 Bos. & Pull. 321.

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that of any layman. But with regard to his ecclesiastical estate, the matter is quite different; and the present state of the law on this subject may be said to be rather unsatisfactory, inasmuch as it affords every opportunity for that which is nearly allied to fraud.

How it affects his ecclesiastical estate.

It would be unnecessary here to enter into the detail of proceedings in bankruptcy or insolvency; it may be stated generally that the effect is the same in both cases, so far as that the property of the bankrupt or insolvent is legally passed to the assignees. In the case of insolvency it has been provided that nothing in the act directing the assignment, &c. shall extend to entitle the assignees of the estate and effects of the insolvent, being a beneficed clergyman or curate, to the income of such benefice or curacy for the purposes of the act, but that it shall be lawful for the assignees to apply for and obtain a sequestration of the profits of any such benefice; and the order of adjudication made on the insolvent's petition shall be a sufficient warrant for the granting of such sequestration without any further writ or other proceedings. And such sequestration shall accordingly be issued as the same might have been issued upon any writ of *levari facias*.[a]

Sequestrations under.

The effect of this is the same as in the case of bankruptcy,[a] namely, that only the right to obtain possession of the ecclesiastical estate passes to the assignees, and not the ecclesiastical estate itself. The assignees therefore are just in the same position as any individual creditor who has obtained judgment; and their position being the same, it follows that any such creditor, according to the rule before mentioned, may, by obtaining the prior sequestration, obtain satisfaction of his debt, before any thing could be obtained by the assignees. In other words, it seems that any individual creditor may supersede, and so far defeat the right of the general creditors; for it is said by Lord Denman, that the sequestration issued by the assignees must be subject to other writs which have a priority, and that a creditor who has levied any thing under such a writ is entitled to retain it against the assignees.[b]

Effect of such sequestrations.

But there is a further hardship in this state of the law, for the right to the property does not actually pass to an insolvent's assignees, so as to give them a right to apply for a sequestration, until the adjudication of the Insolvent Debtor's Court; that adjudication therefore being to them

Probable injustice.

[a] 7 Geo. 4, c. 57, s. 28; and see 1 & 2 Vict. c. 110, s. 55.
[a] *Ex parte Meymott*, and *Arbuckle* v. *Cowtan*, ante.
[b] *Bishop* v. *Hatch*, 1 Ad. & Ell. 171.

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what a writ of *levari facias* would be to any judgment creditor, so that, as it was observed by Patteson, J., the hands of the assignees are tied, until the adjudication of the Insolvent Debtors' Court, while other creditors have notice, and are at liberty to proceed against the benefice.[c]

When right to a sequestration might be lost by creditors.

If any judgment creditor, being entitled to the benefit of any security, shall, before the property so charged or secured shall have been converted and realised, and the produce applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken in execution, he shall then be deemed to have relinquished all right and title to the benefit of such security.[d] In such a case, therefore, it seems that the judgment creditor could not obtain a sequestration.

It only remains to be observed, that the provisions of the more recent act for the relief of insolvent debtors, appear to make no alteration in these respects, the section applicable to the ecclesiastical estate of an insolvent being to precisely the same effect as that of the prior act.[e]

How far sequestration affects the qualification for a justice of the peace.

Where the qualification of a justice of the peace is an ecclesiastical benefice, a sequestration issued at the suit of a creditor, under which possession has been duly taken, and the profits received, is an "incumbrance affecting the estate" within the statute 18 Geo. II. c. 20, s. 1. And in a penal action against the incumbent for acting as a justice without being qualified, the writ of *sequestrari facias* is admissible in evidence against him, although the judgment roll contains no entry of an award of the writ.

Upon issuing such sequestration against a vicar, the bishop licensed him as a stipendiary curate, directed the sequestrator to pay him 120*l.* a year as such, and assigned to him the vicarage house and grounds as a residence, which were together worth above 100*l.* a year; upon which it was held that the salary and the grounds being enjoyed by assignment of the bishop, and not simply as vicar, were no qualification within the above statute; that the vicar being bound to reside, notwithstanding sequestration, occupied the house by right as vicar, and not by the bishop's assignment, which, *quoad hoc*, was merely void, but that such house, unless proved to be alone worth 100*l.* a year, was no qualification.[f]

Original sequestrations from the bishop.

The second kind of sequestrations are such as issue originally from the bishop as an ecclesiastical sentence.

For dilapidations.

Of these the most common was formerly that which was

[c] *Bishop* v. *Hatch*, ante.
[d] 1 & 2 Vict. c. 110, s. 16.
[e] See same act, s. 55.
[f] *Pack* v. *Tarpley*, 9 Ad. & Ell. 468.

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issued as a remedy for dilapidations, where the incumbent upon being monished to repair, neglected to do so for two months after the monition, and the monition might formerly have come from the archdeacon, but now every proceeding for this purpose would be according to the provision of the 1 & 2 Vict. c. 106, which has been already noticed under the head of dilapidations.[g] Here it need only be observed, that such sequestration would be in the same manner as those for non-residence, &c. next mentioned.

For non-residence, illegal trading, and keeping illegal possession of premises.

The statute of 1 & 2 Vict. c. 106, has imposed the penalty of sequestration on several ecclesiastical offences; and more especially for certain cases of non-residence, for illegal trading, and for not giving up to a curate possession of premises which have been assigned to him by the bishop.[h]

Application of sequestered profits.

In all these cases, as has been already observed, in speaking of those subjects separately, the bishop is authorised, upon non-compliance with his monition, to sequester the profits of the benefice, and to direct, by any order made under his hand, and filed in the registry of the diocese, the application of such profits, after deducting the necessary expenses of serving the cure, either in the whole, or in such proportions as he shall think fit, in the *first* place, to the payment of the penalties proceeded for, if any, and of such reasonable expenses as shall have been incurred in relation to such monition and sequestration; and, in the *next* place, towards the repair or sustentation of the chancel, house of residence of such benefice, or of any of the buildings and appurtenances thereof, and of the glebe and demesne lands; and, in the next place, where such benefice shall be likewise under sequestration at the suit of any creditor, then towards the satisfaction of such last-mentioned sequestration; and after the satisfaction thereof, then and in the *next* place towards the augmentation or improvement of any such benefice, or the house of residence thereof, or any of the buildings and appurtenances thereof, or towards the improvement of any of the glebe or demesne lands thereof, or to order and direct the same, or any portion thereof, to be paid to the treasurer of the governors of the Bounty of Queen Anne, as such bishop shall in his discretion, under all circumstances, think fit and expedient; and it shall also be lawful for the bishop, within six months after such order for sequestration, or within six months after any money shall have been actually levied by such sequestration, to remit to such spi-

Remission of part of profits.

[g] See ante.

[h] 1 & 2 Vict. c. 106, ss. 31, 54, 114.

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ritual person any proportion of such sequestered profits, or to cause the same, or any part thereof, whether the same remain in the hands of the sequestrator, or shall have been paid to the said treasurer, to be paid to such spiritual person; and every such sequestrator, at the suit of the bishop, is required, upon receiving an order under the hand of such bishop, forthwith to obey the same; and the said treasurer is authorised and required, upon receiving a like order from such bishop, to make such payment out of any money in his hands: provided, that any such spiritual person may, within one month after service upon him, of the order for any such sequestration, appeal to the archbishop of the province, who shall make such order relating thereto, or to the profits that shall have been so sequestered, for the return of the same, or any part thereof, to such spiritual person, or to such sequestrator, at the suit of any creditor (as the case may be), or otherwise as may appear to such archbishop to be just and proper; but, nevertheless, such sequestration shall be in force during such appeal.[i]

Appeal.

Such appeals must be in writing, signed by the party appealing; and no proceeding shall be had in any such appeal until the appellant shall, if required, have given security in such form and to such amount as the archbishop shall direct, of payment to the bishop of such costs as shall be awarded by the archbishop, if he shall decide against the appellant; and after such security, if required, shall have been given, the archbishop shall forthwith, either by himself or by some commissioner or commissioners, appointed under his hand, from among the other bishops of his province, make, or cause to be made, inquiry into the matter complained of; and shall, after such inquiry, and, in the latter case, after a report in writing from his said commissioner or commissioners, give his decision in such appeal in writing under his hand; and when he shall decide the merits of the appeal against the appellant, he shall also award and direct whether any and what amount of costs shall be paid by the appellant to the bishop respondent; and, in like manner, when he shall decide in favour of the appellant, he shall also award and direct whether any and what amount of costs shall be paid by the bishop respondent to the appellant.[k]

Mode of appealing.

It is to be observed, however, that, in the case of a clergyman who is suspended, and his living sequestered for illegal trading, there is an exception in some respects from the order in which the profits are to be applied; for in that case no part of the profits is to be paid to the clergyman

Application of profits in case of illegal trading.

[i] Sect. 54. [k] Sect. 111.

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so suspended, nor in satisfaction of a sequestration at the suit of a creditor.[l] And, indeed, in any case, where the profits of the benefice are applied in satisfaction of a creditor's sequestration, it does not seem that any penalty would be thereby inflicted on an incumbent.

For curate's salary and mortgage money.

Besides these sequestrations as penalties, the same statute gives authority to sequester for particular purposes, as for the payment of so much of the curate's salary as shall be proved to the satisfaction of the bishop to remain unpaid, together with full costs of recovering the same;[m] also for payment of the principal or interest of money raised by mortgage, under the powers of that act, which have been already mentioned; and also for insuring against fire any buildings which may have been erected under the provisions of that act. But in all these last cases, it does not appear that the bishop could sequester only so much as would be sufficient for these payments; for the power given to him is to sequester the profits until the payment shall be made; so that the sequestration in these cases is also in the nature of a penalty.[n]

For insuring.

Sequestrations under benefice pluralities act to have priority.

Every sequestration, issued under the provisions of this act, is to have priority; and the sums to be thereby recovered are to be paid and satisfied in preference to all other sequestrations; and the sums to be thereby recovered, except such sequestrations as shall be founded on judgments duly docketed before the passing of this act; and also except such sequestrations as shall have been issued before any sequestration under this act, under the provisions of the act of George III., for promoting the residence of the parochial clergy, and the monies to be recovered by such excepted sequestrations respectively.[o]

Section 2.

Of Resignation.

Definitions of resignation.

Another manner, in which the interest of an incumbent in his benefice may be determined, is by resignation; which is by Degge defined to be, where a parson, vicar, or other beneficed clergyman, voluntarily gives up and surrenders his charge and preferment to those from whom he received the same; while by another, perhaps a better definition, it is said to be the voluntary yielding up into the hands of the ordinary the interest the incumbent has in his benefice.[p]

[l] Sect. 31. [m] Sect. 83. [n] Sect. 67.
[o] Sect. 110. [p] Godolph. Abr. 284.

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To whom resignation may be made.

And resignation can only be made to a superior; this is a maxim in the temporal law, and is applied by Lord Coke to the ecclesiastical law, when he says, that therefore a bishop cannot resign to the dean and chapter, but it must be to the metropolitan, from whom he received confirmation and consecration.[q]

To the immediate superior.

And it must be made to the next immediate superior, and not to the mediate; as of a church presentative to the bishop, and not to the metropolitan.[r]

That ordinary, who hath the power of institution, hath power also to accept of a resignation made of the same church to which he may institute; and, therefore, the respective bishop, or other person who, either by patent under him, or by privilege or prescription, hath the power of institution, is the proper person to whom a resignation ought to be made. And yet a resignation of a deanery in the king's gift may be made to the king; as of the deanery of Wells. And some hold that the resignation may well be made to the king of a prebend that is no donative; but others, on the contrary, have held, that a resignation of a prebend ought to be made only to the ordinary of the diocese, and not to the king, as supreme ordinary; because the king is not bound to give notice to the patron (as the ordinary is) of the resignation;[s] nor can the king make a collation by himself, without presenting to the bishop, notwithstanding his supremacy.[t]

Deanery.

Prebend.

In the case of a donative.

But if the living be a donative, the incumbent should resign it to the patron, since the patron has power to admit, and institution by the bishop is not necessary; and if there are two patrons of a donative, the incumbent may resign to one of them.[u]

In what manner it should be made.

Regularly, resignation must be made in person, and not by proxy. There is indeed a writ in the register, entitled *litera procuratoria ad resignandum*, by which the person constituted proctor was enabled to do all things necessary to be done in order to an exchange, and of these things resignation was one. And Lindwood supposeth that any resignation may be made by proctor; but in practice there is no way, as it seemeth, of resigning, but either to do it by personal appearance before the ordinary, or at least to do it elsewhere before a public notary by an instrument directed immediately to the ordinary, and attested by the said notary, in order to be presented to the ordinary by

[q] Roll. Abr. 358; 3 Burn's E. L. 321.
[r] Ibid.
[s] Ibid. Godolph. Abr. 191.
[t] But if the patronage should be, as it often is, in the crown, such a reason would be inapplicable.
[u] Godolph. Abr. 191; 3 Burn's E. L.

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such proper hand as may pray his acceptance; in which case the person presenting the instrument to the ordinary doth not resign *nomine procuratorio*, as proctors do, but only presents the resignation of the person already made.[x]

Not complete until accepted.

But although a resignation of a benefice may be thus made by an incumbent, yet it is not valid, nor consequently is the church void until such resignation has been accepted by the ordinary;[y] that is to say, no person appointed to cure of souls can quit that cure or discharge himself of it but upon good motives to be approved by the superior who committed it to him, for it may be he would quit it for money, or to live idly or the like.

All presentations, therefore, which are made to benefices resigned before such acceptance, are void.

The acceptance is a domestic, not a judicial act.

Lord Chancellor Erskine mentioned that upon conversing with a person of great eminence in the ecclesiastical court, he found that this act of acceptance by the bishop was not considered a judicial but a domestic act, the law confiding to him that he would not permit resignation for improper purposes, and that the act was done *in camerâ*, requiring no registration.[z]

What is a sufficient acceptance.

And in that case it was held that the resignation of a living sent by post to the bishop, who indorsed and signed a memorandum of his acceptance upon it with all the formality necessary to give it effect, was sufficient, although nothing was done upon it so as to give it publicity until after the vacancy: it was added, however, that under such circumstances the bishop could not, as between him and the patron, insist upon a lapse.[a]

The bishop not compellable to accept resignation.

It has been said that there is no pretence for saying that the ordinary is obliged to accept, since the law has appointed no known remedy if he will not accept, any more than if he will not ordain.[b]

Opinions of the judges on this point.

But this cannot be taken to be quite so clear as seems here to be supposed, for in the case of the *Bishop of London* v. *Fytche*, which we shall mention presently, this question was expressly proposed to the judges, namely, whether the ordinary was bound to accept a resignation; but that point, it seems, had not been discussed in the argument of the case, and it was therefore answered by most the judges, that this being entirely a new case, and not made a question of in the courts below, or ever argued at the bar of the Lords, they begged leave for the present to decline answering it. One, however, thought he was

[x] Gibs. 822; Wats. c. 4.
[y] 3 Burn's E. L.; Godolph, Abr. 261.
[z] *Heyes* v. *Exeter College*, 12 Vesey, 346.
[a] Ibid. 343.
[b] Gibs. 822; 1 Still. 334; 3 Burn's E. L.

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compellable by *mandamus*, if he did not show sufficient cause: Lord Thurlow seemed to be of opinion he could not be compelled, particularly by *mandamus*, from which there is no appeal or writ of error: another judge observed, that if he could not be compelled, he might prevent any incumbent from accepting an Irish bishopric, as no one can take that until he has resigned all his benefices in England.[c]

Other opinions on the same subject.

In a case in 1775 it is reported to have been said by the Lord Chancellor, that it was in the power of the ordinary to accept or refuse a resignation.[d]

And so in the case of *Heskett* v. *Gray*, mentioned in Dr. Burn's work, where a general bond of resignation was put in suit, and the defendant pleaded that he offered to resign, but the ordinary would not accept the resignation, the Court of King's Bench were unanimously of opinion that the ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse a resignation as he thinks proper, and judgment was given for the plaintiff.

And in a case before the Court of Chancery, in 1806, it appears to have been mentioned in the argument as a settled point on which there was no doubt, that the bishop could not be compelled to accept a resignation.[e]

Lastly, in the retrospective act of 7 & 8 Geo. IV., which was passed to protect those who had unconsciously incurred penalties in giving and taking special resignation bonds, it is provided that nothing in that act shall be deemed compulsory on the ordinary to accept a resignation,[f] thereby plainly implying that but for the act it would not have been compulsory. It appears therefore that, notwithstanding the refusal of the judges to answer the question put to them in the case of *The Bishop of London* v. *Fytche*, and the answer of one of them, before mentioned, there can scarcely exist any doubt at present but that a bishop may at pleasure, and without any cause assigned, refuse to accept a resignation; and if the question were *res integra*, it might be a strong argument in favour of his having such power, that it is doubtful who could finally judge of the sufficiency of the cause, if he were bound to assign one, or by what mode he might be compelled to accept.

Possible mode of resigning without leave from or acceptance by the bishop.

It may however be here observed, that the recent statute of 1 & 2 Vict. c. 106, seems to have introduced a method by which a clergyman desirous of resigning, but

[c] See 3 Burn's E. L. 320, note to 8th edition.
[d] *Marchioness of Rockingham* v. *Griffith*, 4 Bac. Abr. 472.
[e] *Heyes* v. *Exeter College*, vide ante.
[f] Sect. 3.

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whose resignation has been refused by the bishop, or which it is supposed, under the circumstances, would be refused by him if tendered, might in some cases attain his end; for, if he could get presented and instituted to another living, however trifling in value, contrary to that act, or which could not, under the provisions of that act, be tenable with the benefice previously held, then such former benefice, which he may have wished to resign, will be and become *ipso facto* void, as if he had died or had resigned the same, any canon, law, usage or custom to the contrary notwithstanding.[g]

Excepted case in which bishop is compelled to accept resignation.

And there is one case of resignation in which it has been specially enacted that the ordinary may not refuse to accept unless on good and sufficient cause to be shown for that purpose; this is where a special bond of resignation has been given in such manner and with such persons named in it as makes it good and valid, according to the last statute passed for that purpose, and according to the present state of the law;[h] and it may be observed that the exception in such a case tends to confirm the general rule as above laid down.

What resignations are allowed by law.

But, as it was said by one of the judges in the case of *Fletcher* v. *Lord Sondes*, the bishop would probably neither accept nor refuse to accept a resignation unless he were satisfied that it might properly be done according to law; and this therefore brings us to the consideration of what resignations may be properly accepted, and what should be considered bad and illegal.

No condition must be annexed.

In the first place, no collateral condition can be annexed to a resignation; the words being *purè, spontè, absolutè, et simpliciter*, in order to exclude all indirect bargains not only for money but for any other valuable consideration: there is an exception, however, where the resignation is made for effecting an exchange; in which case it admits of this condition, that the exchange shall take full effect.[i]

Penalty for corrupt resignation.

It is enacted by a statute of 31st Eliz.[k] that if any incumbent of any benefice with cure of souls shall corruptly resign or exchange the same, or corruptly take for or in respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or other benefit whatsoever, as well the giver as the taker of any such pension, sum of money or other benefit corruptly, shall lose double the value of the sum so given, taken or had; half to the queen, and half to him that shall sue for the same in any of her majesty's courts of record.

[g] 1 & 2 Vict. c. 106, s. 11; vide ante, "Pluralities."
[h] Vide post.
[i] Cruise, Dig. tit. xxi. 75, and ante, "Exchange."
[k] Cap. 6, s. 8.

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Early evasions of this statute.

Speaking of this statute, Degge says, "There is of late a practice introduced by corrupt patrons, that, if not early nipt in the budding, will make this law of none effect: I mean, the taking bonds for resignation. This practice took its rise from two cases in Sir G. Croke's Reports."[l]

Bonds for resignation.

He adds, "That it appears by both these cases that bonds taken upon prudent and just ends to resign, are not simoniacal; but where such bonds are taken upon corrupt designs, which being made to appear by any subsequent practice, it is clearly simony, as if the bond be expressly to pay money; for what difference is there between a bond expressly to take money, and a bond to resign, which is to pay money? If the patron say, either pay me my money or resign, then all the world knows in such a case the parson must pay the money or resign and be undone; and the world shall not persuade me that those reverend judges that gave these judgments ever intended further; and I hope that those reverend judges that now supply their places will discontinue and discourage such practices, that tend so much to the ruin of the Church and religion."[m]

Special bonds.

It had been long a common practice for patrons, when they presented a clerk to a living, to take a bond from him in a sum of money, conditioned either to resign the living in favour of a particular person, as a son, relation or friend of the patron, whenever such son, &c. became capable of taking the living, or else to resign generally upon the request of the patron. In the first case they were called special bonds of resignation; and until a recent determination,[n] a very general opinion prevailed that they

General bonds.

were valid. In the second case they were called general bonds of resignation, and were never approved of by the bishops, though in some cases held to be valid by the courts of law and equity. But whenever they were used for the purpose of obtaining any pecuniary advantage from the person presented, the Court of Chancery always interposed, and granted an injunction against them.[o]

Resignation bonds not favoured in courts of equity.

Dr. Watson observes that general bonds of resignation did not find any encouragement from the Court of Chancery, which relieved the incumbent, and would not oblige him to resign or to pay the penalty of the bond, unless some special cause were shown and made out by the patron that he was unqualified to hold the living, or guilty of some

[l] Vide Cro. Jac. 48; Cro. Car. 180. [m] Degge, 43.
[n] *Fletcher* v. *Lord Sondes*, 3 Bing.
[o] Cruise, Dig. tit. xxi. c. 2, 78; 12 Mod. 504; *Hilliard* v. *Stapleton*, 1 Ab. Eq. 86.

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immorality or irregularity which was a sufficient cause of deprivation, or at least that he was non-resident and neglected his duty.[p]

These evasions of the statute of Elizabeth appear, nevertheless, to have been upheld in Westminster Hall, until the House of Lords, in two several decrees, which appear to have been most fully considered, determined, first, that general bonds of resignation, and afterwards that special bonds also, were illegal.

General and special bonds declared illegal by the House of Lords.

The rectory of the parish church of Woodham Walton, in the diocese of London, becoming vacant,[q] Mr. Fytche, the patron, presented his clerk, the Rev. Mr. Eyre, to the bishop for institution; the bishop, being informed that Mr. Eyre had given his patron a bond in a large penalty to resign the said rectory at any time upon his request, and Mr. Eyre acknowledging that he had given such a bond, the bishop refused to institute him to the living. Mr. Fytche brought a *quare impedit* against the bishop, to which he pleaded two pleas: 1. That the living was a benefice with cure of souls, and that the clerk had given a bond to the patron in the penalty of 3,000*l.* to resign at any time upon the request of the patron, whereby the presentation became void in law; 2. That the living was a benefice with cure of souls, and that, for the purpose of investing the patron with an undue influence over the clerk, it was agreed that the clerk should, in consideration of the presentation, become bound to the patron in a bond as aforesaid, which was accordingly done.

General bonds for resignation.

The case of *Bishop of London* v. *Fytche.*

Mr. Fytche demurred to both these pleas. The bishop, having joined in demurrer, judgment was given by the Court of Common Pleas for the patron, and affirmed by the Court of King's Bench.

Upon a writ of error in the House of Lords, it was contended, on the part of the bishop, that although there were several adjudged cases upon the subject of general bonds of resignation, none of them had arisen in the said form, or between parties acting in the same capacity, and other circumstances similar to the present; therefore they ought not to be considered as precedents by which this case was to be determined. That the bishop or ordinary was authorized by law to judge in the first instance of the fitness or unfitness of the person presented to him for institution; and the appellant had, in this instance, exercised his authority according to law. That it was in the power of the patron, by means of a general bond, to establish two modes

[p] Wats. C. L. 30.

[q] *Bishop of London* v. *Fytche*, Bro. P. C. 211; 1 East, 486.

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of selling a vacant living, which was simony; either of which was equally certain and infallible. 1. The parties might make the penalty in the bond adequate to the price of the living. The presentee, when instituted, might refuse to resign, and pay the penalty without any suit, or might make known the execution of the bond, and then tender resignation to the bishop; which the bishop, under those circumstances, would probably refuse. Upon his refusal, the bond might be put in suit, and thus also, by a circuity, the penalty might be paid as the price of the living.

The second mode of selling a living which was vacant, through the medium of a general bond of resignation, was equally obvious and practicable. The penalty of the bond of resignation might be made excessive, much above the real value of the living; the patron might, during the incumbency of the presentee who executed the bond to resign, sell the next turn or right of presentation at an advanced price, and, after such sale, require the incumbent to resign in terms of his bond. By this means, the first presentation would be fictitious; and the sale of the second presentation, though made under the pretence of selling a right of presentation to a full benefice, would in reality be the sale of a vacant living. That a general bond to resign put the person who entered into such bond under the power of the lay patron, instead of being under the authority of the bishop, to whom he swears canonical obedience, and whom by law he was obliged to obey; and was thus, contrary to good policy, creating an influence which tended to subvert ecclesiastical discipline and subordination. That general bonds of resignation were contrary to law, by altering the tenure of the office of a beneficed clergyman; for every benefice being an office for life, the patron could grant it only for life. He could not grant it for years, he could not grant it at the will of himself, for such grant in direct terms would be void, as contrary to the very tenure of the office. Where there was a general bond of resignation entered into, the same alteration of the tenure was effected by circuity. The patron granted, and the presentee accepted, at the will of the patron, that benefice which the law intended to be conferred and holden for life.

That although a court of equity would grant relief in case the patron made an improper use of a general bond to resign, yet, from the extreme difficulty of discovering the real purpose for which it was used, it could seldom be possible to procure such relief, or to guard, by that means, against the consequences that follow from such bonds being tolerated. The bad purpose, not being discovered,

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could not be prevented but by a solemn decision, that general bonds of resignation were illegal. That a general bond of resignation puts it in a great measure in the patron's power to convert a part of the profits of the living to his own use, and absolutely puts it in the power of patron and incumbent together to make such partition of them as they can agree upon, whereby the revenues of the church may be alienated; and that a general bond of resignation was an assurance of profit or benefit to the patron, and therefore contrary to the stat. 31 Eliz. c. 6, and inconsistent with the oath of simony.

On behalf of the defendant in error, it was said that this was a new attempt to question the settled law of the land; namely, whether a bond given by the presentee to the patron, with a condition to resign upon request, which was termed a general resignation bond, simple, and unattended with any other fact or circumstance, was corrupt, simoniacal, and against the statute of Elizabeth. This had been questioned, and repeatedly determined in Westminster Hall to be legal, and not simoniacal; and it was looked upon to be so well settled and established, that in *Hesketh* v. *Gray*, 28 Geo. II., the court would not suffer the counsel to argue against the validity of such a bond. But such a bond might be abused; it might be corrupt, simoniacal, and against the statute; it might be given upon a preceding stipulation of gain, &c.; or, after it was innocently given, it might be used by the obligee for the purpose of withholding tithes, or deriving some pecuniary advantage to himself. And if there were only grounds to suspect such practices, a bill might be filed for a discovery; and it was admitted, that when such illegal facts were alleged and proved, such a bond could not be enforced in a court of justice. But the courts of justice never interfered with possibilities. They never interfered but when such abuse appeared, and was specified and alleged in the pleadings, in order to be proved, if denied. That the bishop in this case was precisely in the same predicament with the clerk in all the other cases; he had the same advantage of filing a bill for a discovery of such illegal fact, and of pleading it when he had so discovered it; and he had it in the present case.

But the bond in the present case was a mere simple resignation bond, unattended with any such illegal circumstance; every such circumstance, suggested by a bill for a discovery, had been denied; no such abuse was specified in the first plea; and therefore the cause therein alleged by the bishop was not sufficient for him to refuse the clerk.

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That the same reasoning might be applied to the second plea, the possible abuse of such a bond: viz. that he would have acquired, and had undue influence, power, and control over the clerk, if he had admitted him; so also as to the unfitness of the clerk. But in order for the courts to interfere, the undue influence must have happened; it must then be specified and alleged in the plea, in order for the court of justice to interfere: the unfitness, in like manner, must be specified and alleged, in order to be proved. But the bond in the present case was unattended with any such circumstance, and therefore neither any undue influence or unfitness was specified in the second plea to have attended the presentation; consequently, the cause here alleged was not sufficient for the bishop to refuse the clerk.

As to the propriety of specifying the unfitness, it might be observed, that the judgment of the bishop was subject to review; he could not refuse *ad libitum*, he must assign his cause for refusal; for every fact of unfitness might be questioned, and tried in a temporal court, except literature; and that was subject to the review of the metropolitan.[r] Upon the whole, there was no fact alleged in the pleadings of illegal use in giving the bond, or of undue influence or unfitness in the clerk to be admitted, &c., besides the mere naked giving of the bond; wherefore it was hoped the judgment of the Court of King's Bench would be affirmed.

After hearing counsel on this case, several questions were put to the judges, seven of whom were of opinion that the bond was good and valid, and the eighth (Mr. Baron Eyre) that it was illegal. A debate and division of the house ensued, when, there appearing to be for reversing the judgment nineteen, among whom were all the bishops present, and against it eighteen; it was ordered that the judgment given in the Court of King's Bench, affirming a judgment given in the Court of Common Pleas, should be reversed.[s]

Remark of Park, J. upon the above case.

The decision of this case appears to have been against the strong opinions of Westminster Hall; and Park, J. said of it, in giving his opinion in the House of Lords in the case of *Fletcher* v. *Lord Sondes*, "I am old enough in Westminster Hall to remember that the decision of that case created a great sensation in the profession:" in fact, the practice of giving general bonds had long prevailed, and had been considered legal.

[r] Vide ante, "Institution."

[s] There has probably never been a case in which a double decision of the courts below, supported by the opinion of so large a majority of the judges, has been reversed by so inconsiderable a majority in the House of Lords.

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Although, therefore, in consequence of this determination, general bonds of resignation were deemed illegal and void, the courts of law did not seem disposed to condemn bonds of resignation, unless they were exactly similar to that which was held unlawful in the above case.

Unwillingness of the courts to accept the above decision.

Thus in a subsequent case, which was an action on a bond given by the defendant on his appointment to the curacy of the free chapel of Wormhill, in the county of Derby, which, after reciting that the defendant had agreed to be constantly and duly resident at the curacy house there, and in default of such residence to resign and deliver up the curacy within one month after request or notice in writing left at the curacy house, so that the patron might present anew, was conditioned for such resignation in default of such constant and due residence, (so that the patron (obligee) might present anew, discharged of all charges and incumbrances done and suffered by the obligor,) and for the not committing waste or dilapidation upon the houses or lands belonging to the curacy,—Lord Kenyon said, "I cannot bring myself to entertain a doubt on this case. It has been argued that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest; for it is a subject of conveyance, with a valuable consideration, which is not the case with a naked trust. As soon as the defendant was presented to the living, he was bound to take upon himself all the duties of an incumbent, to reside on the living, to take upon him the cure of souls, and to keep the house in proper repair. Now this bond was entered into for the purpose of securing a peformance of all those duties, which by law, and without the bond, he was bound to discharge. I avoid saying anything respecting the case of *The Bishop of London* v. *Fytche;* when that question comes again before the House of Lords, they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me, in deciding the present case, to say it cannot be governed by that; for here the plaintiff does not call for the resignation of the incumbent, but merely for a performance of those duties which, in morality, religion and law, he ought to do. I am, therefore, clearly of opinion that a bond for the performance of these duties is not illegal." And Mr. Justice Buller says, in the same case, "I cannot find any immorality or illegality in this bond. It is the duty of an incumbent to reside on his living, and to be regular in the discharge of his duty. Now this bond

And subsequent contrary decisions in the courts below.

Opinion of Lord Kenyon on the above case.

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requires nothing more; it only requires him to do what the law would have compelled him to do without it."[t]

And again, in a subsequent case, where a clerk had given a bond to the patron on the presentation, on condition to reside on the living, and to resign if the patron's son became capable and desirous of taking the living, and also to keep the rectory house and chancel in repair, the Court of King's Bench, in an action of debt on this bond, understanding that it was intended to carry the case up to the House of Lords, gave judgment for the plaintiff without any argument; saying, that as this was not precisely similar to the case of *The Bishop of London* v. *Fytche*, they were bound by the established series of precedents.[u]

Special bonds of resignation upheld for a time.

And a distinction appears to have been introduced, probably immediately after the above decision in *Bishop of London* v. *Fytche*, between general and special bonds of resignation; and the courts, by a series of decisions, seemed to have settled that, although bonds and other assurances for general resignation might be void, yet that they were valid when given for securing the resignation of ecclesiastical preferments in favour of specified individuals.

But, in the year 1826, a case upon this point was carried up to the House of Lords,[x] in which the opinion of the judges was requested; and as they differed, each judge delivered his opinion separately.

Arguments of the judges for and against special bonds of resignation.

Those who were in favour of the legality of such bonds seem to have been influenced principally by the cases previously decided; Gaselee, J., stating that he had cautiously abstained from entering into the question how far such bonds were or were not consistent with public policy, because the case was not new, and that as such bonds had been held good for centuries, it was too late to consider that question in a court of law; and that the practice had too long prevailed, and had been too often recognised as legal, to permit it to be altered by any other than legislative authority.

The majority, on the other hand, who were against the legality of such bonds, treated the case as if it were within all the mischief which the decision in *The Bishop of London* v. *Fytche* was intended to prevent; that it was an instrument, the result of barter and contract between the obligor and obligee; that it would be easy to make such a species of contract the means of selling an advowson during a vacancy, as in a possible case thus stated by

[t] *Bagshaw* v. *Boselley*, 4 T. R. 78.
[u] *Partridge* v. *Whiston*, 4 T. R. 359.
[x] *Fletcher* v. *Lord Sondes*, 3 Bing. 501.

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Hullock, B.: "The value of the living is calculated, a bond is given for the amount, conditioned to be void on request, when a certain specified individual has become capable of taking the living. That event happens almost immediately, by the insertion of a person, who if he lived would, within a very few months, become capable of holding an ecclesiastical benefice. The incumbent is called on to resign; he refuses, but prevents a suit on the bond by paying to the obligee the amount of the penalty; would such a proceeding, legal, if this bond be legal, operate a benefit to the patron for and in respect of his presentation? But, whether the money or the resignation of the living is obtained, the obligee acquires to himself a benefit, in every sense of that word, for his presentation." Or, as Park, J., said to the same effect, "I am at a loss to apprehend any case of a bond of resignation, general or special, which is not a profit or a benefit. Even in the case, most highly to be favoured, by (of?) a parent, and perhaps the least guilty of all, a bond to resign in favour of a son, is that not a benefit? Suppose the son twenty-one, and the father allows him 400*l.* per annum till he is of the canonical age of twenty-four, and that the living he intends for him falls vacant, and he fills it up for three years, taking a bond in 12,000*l.*, then to resign in favour of his son. If the incumbent resign, the patron puts his son into a living, perhaps of 800*l.* a-year, and derives the benefit from saving his own allowance of 400*l.*; or, if the incumbent will not resign, finding the living cheaply purchased for 12,000*l.*, and pays the penalty, the patron gets all that money to settle on the son, and thus, in effect, he sold a void presentation: and, depend upon it, my lords, that if these special bonds, as they are called, be allowed, you will have every device put on foot, by artful, designing and acute men in the lower department of the law, to evade and elude the wholesome provisions of this statute, and render it a dead letter on the statute book. Indeed, I verily believe that special bonds of resignation, though known, never came into very general use till after, and were a contrivance to elude, the decision in *Fytche's case*. It is much to be feared that, if encouraged, these special bonds will be given as if intended for cases of resignation, but will be a mere device, between a needy patron and a monied incumbent, to pay a sum of money in two or three years, as the apparent penalty for not resigning, when it never was intended he should, but only in this form he should secure a fortune, when the law clearly would not permit a present payment."

Opinion of Park, J.

And it was further urged, that the effect of resignation

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bonds, general or special, was to convert that office which, by presentation, institution and induction, becomes an office for life, and in which the rector has the freehold, into a term for years, of a longer or shorter duration, at the pleasure of the owner of the advowson, according to the object he has in view; and that, therefore, any contract, bond, &c. by which the incumbent undertakes to resign, being inconsistent with his actual intention, as recognised by law, and with that life estate which, as rector, he has in his living, must be contrary to law.

Special bonds for resignation declared illegal.

After hearing the opinion of the judges and that of the lord chancellor, the House of Lords formally decided to the effect that all bonds for resignation, special as well as general, were simoniacal and illegal.

The lord chancellor observed, that the decision would come by surprise and bear harshly on many patrons and incumbents, and suggested that those who had committed themselves by such bonds should be indemnified from the penalties to which they were liable for what had been declared simony; whereupon the Archbishop of Canterbury expressed his concurrence with the lord chancellor, and immediately moved a bill, to have a retrospective operation, for the purpose of protecting certain special resignation bonds which had been made previously to that time, and for exempting patrons and incumbents from the penalties to which, from an erroneous impression of the law, they might have exposed themselves. This bill subsequently passed into an act,[y] which, reciting that spiritual persons and patrons, and other persons, would suffer great hardship and detriment unless they be relieved from the penalties to which they had, by acting erroneously, but not wilfully, rendered themselves liable, provided that no presentation to any spiritual person, &c. before the 9th of April, 1827, nor any admission, institution, &c. should be void by reason of any engagement entered into by such spiritual person, or any other person or persons, to or with the patron of a spiritual office, for the resignation of the same, to the intent manifested by the terms of such engagement, that some person, or one of two persons, specially named or described therein, should be presented &c. to such spiritual office, or that the same should be given to him, or for the resignation thereof, upon notice or request or otherwise, when a person, or one of two persons, so specially named or described, should become qualified by age or otherwise to take the same; and that the parties thereto shall not be liable to penalties.[z]

Retrospective act to exempt parties from penalties incurred.

[y] 7 & 8 Geo. 4, c. 25.

[z] 7 & 8 Geo. 4, c. 25, s. 1.

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All such engagements entered into *bonâ fide*, were therefore declared valid and effectual in law;[a] and it was also declared, that where any spiritual office is resigned, pursuant to any such engagement, and the person, or one of the two persons so specially named or described therein, shall not be presented, &c. within six calendar months next after such resignation, such resignation shall be void, and the spiritual person who shall have so resigned, shall, without any act or form, and as if such resignation had not been made, be deemed and taken, to all intents and purposes, to be and to have continued the incumbent actually in possession, notwithstanding such resignation, and although within the said six months any other person may have been presented, &c. thereto, provided such person so resigning shall not, by reason of any other act or thing, have become disqualified to hold the same.[b]

Present state of the law.

This act, as we have observed, was intended to have a retrospective operation only; but in the following year an act[c] was passed, which, to a certain extent, alters the effect of the decision of the House of Lords, and by which bonds for resignation are made legal in the following particular cases.

Special resignation valid in some cases.

Every engagement by promise, grant, agreement or covenant, which shall be really and *bonâ fide* made, given or entered into, for the resignation of any spiritual office, being a benefice with cure of souls, dignity, prebend or living ecclesiastical, to the intent and purpose, to be manifested by the terms of such engagement, that any one person whosoever, to be specially named and described therein, or one of two persons to be specially named, being such as after mentioned, shall be presented, &c. to such spiritual office, or that the same shall be given or bestowed to or upon him, shall be good, valid and effectual in the law to all intents, &c., and the performance of the same may be enforced in equity: provided, that such engagement shall be so entered into before the presentation, &c. of the party so entering into the same as aforesaid.[d]

One or two persons may be specially named in the bond.

If entered into before the presentation.

The two persons to be specially named, shall each of them be, either by blood or marriage, an uncle, son, grandson, brother, nephew or grand nephew of the patron, or of one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same, or of the person, or of one of the persons for whom the patron or patrons shall be a trustee or trustees, or of the person, or of one of the persons by whose direction such

And if such persons are within certain degrees of relationship to the patron.

[a] Sect. 2. [b] Sect. 4. [c] 9 Geo. 4, c. 94. [d] Sect. 1.

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presentation, &c. shall be intended to be made, or of any married woman, whose husband, in her right, shall be the patron or one of the patrons of such spiritual office, or of any other person in whose right such presentation, &c. shall be intended to be made.[e]

No presentation, &c., nor any admission, &c., shall be void by reason of any such engagement, by any spiritual persons or others, to or with patrons or others, and his majesty shall not present or collate, or give or bestow such spiritual office, by reason of any such engagement; and such spiritual persons or patrons shall not be subject to any penalties or forfeitures, or to any prosecution or other proceeding, by reason of having made such engagement.[f]

One part of every such instrument to be deposited in the registry of the diocese.

In order to bring any engagement within the operation and protection of the act, one part of the deed, instrument or writing, by which such engagement shall be made, given or entered into, shall, within two calendar months next after the date thereof, be deposited in the office of the registrar of the diocese wherein the benefice, &c. shall be locally situate: in the cases of benefices, &c. within peculiars, to be deposited with the registrar of the peculiar jurisdiction.

Directions as to the instrument so deposited.

Such registrars shall respectively deposit and preserve the same, and shall give and sign a certificate of such deposit thereof.

Every such deed shall be produced at all proper and usual hours at such registry, to every person applying to inspect the same.

An office copy of such deed, &c., certified under the hand of the registrar (which copy so certified, the registrar shall in all cases grant to persons applying for the same), shall be admitted as legal evidence thereof in all courts whatsoever.

Fees to registrar.

Every such registrar is entitled to a fee of two shillings for depositing such deed, instrument or writing, and for certifying such deposit thereof, to a fee of one shilling for every search to be made for the same, and to a fee of sixpence for every folio of seventy-two words of each certified office copy.[g]

Manner in which such resignation is to be made.

Every resignation to be made in pursuance of any such agreement, shall refer to the engagement in pursuance of which it is made, and state the name of the person for whose benefit it is made: and it shall not be lawful for the ordinary to refuse such resignation, unless upon good and sufficient cause to be shown for that purpose. Such

[e] Sect. 2. [f] Sect. 3. [g] Sect. 4.

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resignation shall not be valid and effectual, except for the purpose of allowing the person for whose benefit it shall be made, to be presented, collated, nominated or appointed to the spiritual office thereby resigned, and shall be absolutely null and void, unless such person shall be presented, &c. as aforesaid, within six calendar months next after notice of such resignation, given to the patron of such spiritual office.[h]

All presentations, collations, gifts, or the bestowing of any such spiritual office by the king, either in the right of the crown or duchy of Lancaster; by archbishops, bishops or other ecclesiastical persons, in right of any dignity, office or living; by corporations corporate or sole; by any other in right of any office or dignity; by trustees or feoffees for charitable or public purposes; or by any other person not entitled to the patronage of such spiritual office, as private property; are excepted from the operation of the act.[i] Act extends only to private patrons.

Few questions of equal importance have been regarded with such diversity of opinion by the ablest lawyers as the present; and there has been scarcely one such other instance, where the settled opinions of Westminster Hall have been twice successively overthrown by the decree of our highest judicial tribunal. Review of this subject.

It seems clear, however, that special bonds of resignation, without any restrictions as to the parties named in them, were open to all the objections upon which general bonds of resignation had been held bad. That the decree of the House of Lords in the case of *Fytche* v. *The Bishop of London* was intended to decide, and did virtually decide, the whole question; and that it was only because that decree was opposed to the opinions of the profession, and because many may have thought with Lord Kenyon, "that when the question came again before the House of Lords, they would review their former decision,"[k] that the distinction between general and special resignation bonds was ever allowed to be set up.

The question, as now settled by legislative enactment, does not appear likely to be again disturbed. Any bond or contract to resign, except in the cases specified in the act, is not only so far illegal as to be incapable of being enforced, but makes the presentation void as simoniacal; and subjects the parties to such bond or contract to the penalties for simony, under the statute of 31st Elizabeth before mentioned. But there is nothing which makes it illegal for a clergyman to resign his living at any time in consequence of any understanding or agreement, not com-

[h] Sect. 5. [i] Sect. 6. [k] Vide *Bagshaw* v. *Boselley*, ante.

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pulsory, with the patron; provided the bishop is willing to accept a resignation under such circumstances; or the resignation might, perhaps, in such a case, be effected, in the manner already mentioned, by institution to a second living.

Section 3.

Of Deprivation, Suspension and Degradation.

These three subjects here named may be conveniently considered together in the present section. For suspension in the usual form, *ab officio et a beneficio*, is in fact temporary deprivation, while suspension *ab officio* would be in the nature of a temporary degradation. That which would be equivalent to suspension *ab officio*, may be enforced where there is no benefice; as in the case of curates, lecturers, ministers of proprietary or other chapels, or, in fact, in the case of any clergyman who may be enjoined by the bishop not to officiate in his diocese. But in these cases, the mode adopted would probably be revocation of license in such manner as we have mentioned elsewhere. But the term suspension appears to have been very generally appropriated to cases of beneficed clergymen, suspended *ab officio et a beneficio*, and in that sense we shall consider it here: and from the following definition of deprivation by Degge, we shall see that that also is confined to cases of the same description.

Deprivation.

Causes of, where determinable.

Deprivation, he says, is an ecclesiastical censure, whereby a clergyman is deprived of his parsonage, vicarage or other spiritual promotion or dignity: and the causes of such deprivation are properly and naturally determinable by the ecclesiastical laws of this realm, but because generally there are estates of freehold dependant upon these promotions and dignities, and annexed to them inseparably, which rest at the sole determination of the common law, the courts of common law do sometimes inspect and regulate the proceedings of the ecclesiastical courts; and where they proceed against the rules of law, they frequently prohibit them (especially where such sentence for any offence is inflicted by act of parliament.)[1]

Deprivation is said to be called by the canonists by the names of deposition, degradation, or exauctoration, but in the sense in which we here consider it, it is different from any of those, for those would be the removing a person from

[1] Degge, p. 1, c. 9.

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some degree, dignity, or order in the Church, but this would be the depriving him of his ecclesiastical preferments.

Deprivation may be with or without sentence; the cases where no sentence would be necessary being those where it is declared by statute, that upon the doing or omission to do a certain act, the party shall be *ipso facto* deprived; and these appear to be the *only* cases where a party can be deprived without sentence; for in regard to the other case mentioned in the books of a *layman* presented to a benefice, in which case it is said there is no need of a sentence of deprivation, it would seem that the word deprivation is altogether inapplicable; for as the admission, institution, &c. would be wholly null and inoperative in law, and confer no right or interest, there would be nothing of which such a party could be deprived. May be with or without sentence.

The several offences for which it has been declared by statute that the clergyman shall be *ipso facto* deprived, will be found under the different heads with which those offences are connected, but the following summary of them here may be useful:

Summary of causes for which party may be deprived without sentence.

Simony, by the 31st Eliz. c. 6.

Refusing to use the Book of Common Prayer, or speaking or preaching anything in derogation thereof, or using any other rite or ceremony, and being twice convicted thereof, by 2 & 3 Edw. VI. and 1 Eliz. c. 2.

Not publicly reading the Thirty-nine Articles of Religion in the church whereof he has cure, in the time of common prayer, with declaration of his unfeigned assent thereto, within two months after induction, by 13 Eliz. c. 12.

Not reading the morning and evening prayer, and declaring his unfeigned consent thereto, according to the prescribed form, within two months after actual possession, or, in case of impediment, within one month after such impediment removed, by 13 & 14 Car. II. c. 4.

Not subscribing the declaration of conformity to the Liturgy of the Church of England, and not procuring a certificate under the hand and seal of the ordinary, who is required to make the same; and not publicly and openly reading the same, together with the declaration aforesaid, upon some Lord's day, within three months then next following in his parish church, in the time of divine service, by 13 & 14 Car. II. c. 4, and 1 Will. & M. sess. 1, c. 8.

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The acceptance of a second preferment or benefice, contrary to the provisions of the act for preventing the holding benefices in plurality, by 1 & 2 Vict. c. 106.

If the benefice of any spiritual person continues for one whole year under sequestration, issued under the act 1 & 2 Vict. c. 106, for disobedience to the bishop's monition, requiring such person to reside on his benefice; or if such spiritual person, under the provisions of the same act, incurs two such sequestrations within the space of two years, such spiritual person is deprived, and the benefice becomes void, by 1 & 2 Vict. c. 106.

The cases mentioned above do not, as it seems, necessarily require the intervention of the ecclesiastical court, and consequently do not now require a proceeding under the act for better enforcing church discipline. In all other cases of deprivation, as well as in all cases of suspension, it is necessary that there should be a regular proceeding,[m] which would be either regulated by statute in the particular case, or if there was no particular direction, then by a proceeding under the Church Discipline Act.

Suspension or deprivation at discretion of the bishop in most cases.

For almost every offence for which sentence of deprivation might be passed, sentence of suspension only might be substituted by the bishop, if that should appear to him sufficient to meet the circumstances of the case; but there

Exception.

are some particular cases for which the punishment of deprivation appears to be so far directed by statute, as to leave no discretion to the bishop, although the offending party must be cited before him, and sentence regularly passed.

In cases of clergymen illegally trading, deprivation for third offence is not at the discretion of the bishop.

Thus if any spiritual person shall trade or deal in any manner contrary to the provisions of the act 1 & 2 Vict. c. 106, it shall be lawful for the bishop of the diocese, where such person shall hold any cathedral preferment, benefice, curacy, or lectureship, or shall be licensed, or otherwise allowed to perform the duties of any ecclesiastical office whatever, to cause such person to be cited before his chancellor or other competent judge, and it shall be lawful for such chancellor or other judge, on proof in due course of law of such trading, to suspend such spiritual person for his first offence, for such time not exceeding one year, as to such judge shall seem fit; and on proof, in like manner, before such or any other competent ecclesiastical judge, of a second offence committed by such spiritual person, subsequent to such sentence of suspension, such spiritual person shall, for such second offence,

[m] Gibs. 1046.

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be suspended for such time as to the judge shall seem fit; and for his third offence be deprived *ab officio et beneficio;* and thereupon it shall be lawful for the patron or patrons of any such cathedral preferment, benefice, lectureship, or office, to make donation, or to present or nominate to the same, as if the person so deprived were actually dead.[n]

Suspension or deprivation by sentence.

The offences for which sentence of suspension or deprivation may be passed, will be principally found spoken of under those subjects with which such offences are connected; the following are the principal cases that have been mentioned by statute, or which have occurred in practice.

For maintaining doctrines contrary to Thirty-nine Articles.

The advisedly maintaining or affirming any doctrine contrary to the Thirty-nine Articles, and, when convened before the bishop or commissioners, persisting therein, and being thereof lawfully convicted. This is mentioned in the 13 of Eliz. c. 12, and was the offence for which Mr. Stone was deprived in the case of the *King's Procurator-General* v. *Stone*,[o] which will be found more fully mentioned hereafter, and upon which occasion Lord Stowell mentioned that the above statute was far from obsolete, but on the contrary was *in viridi observantiâ;* and in that case it may be observed that Lord Stowell did not conceive he had the power to pronounce a sentence of deprivation, but the Bishop of London came into court for that purpose, and the sentence of deprivation was passed by him.

For any immoral conduct or offence against the laws ecclesiastical,

Drunkenness after monition, incontinence, gross scandal, flying from justice, disobedience to the orders and constitutions made for the government of the Church, conviction of felony in a temporal court, or of perjury in a temporal or ecclesiastical court, simony, dilapidations, are among the causes of suspension or deprivation mentioned in our books on this subject.[p] But we may extend these by taking the words of the Church Discipline Act, which provides for the proceedings therein mentioned against any clerk in holy orders of the United Church of England and Ireland, who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report, as having offended against the said laws.[q]

Suspension.

But in all these cases, unless there are very aggravating circumstances, the ecclesiastical courts have been inclined to suspend rather than deprive.

[n] 1 & 2 Vict. c. 106, s. 31.
[o] 1 Hagg. Cons. 424.
[p] See 2 Burn's E. L., Deprivation.
[q] 3 & 4 Vict. c. 86, s. 3.

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In one case,[r] in passing sentence, Sir J. Nicholl alluded to a former case, in which a clergyman had been suspended for two years for drunkenness and profaneness, and in which it had been directed that at the end of that time he should exhibit a certificate from those clergymen in his vicinity of good behaviour in the interim, prior to the suspension itself being taken off or relaxed. The learned judge expressed his approbation of such a course, and in the case then before him pronounced a decree of suspension for three years; and following the same course, directed a certificate of good behaviour in the interim to be produced prior to relaxation of the sentence; and further directed a copy of the decree to be transmitted to the consistorial court of the diocese, in order that such sequestration might there be issued, or such other steps taken as the exigency of the case might require.

Usual course to direct certificate of good behaviour to be produced before sentence relaxed.

It does not appear necessary to mention other cases in which suspension or deprivation has been decreed, for it is a subject on which the bishop will, in each case that may come before him, exercise his own discretion as to suspension or deprivation, or the length of time for which suspension may be decreed. During the time the charge against the accused party is under investigation, the bishop may, if he think fit, suspend such party *ab officio*, until the accusation is substantiated or disproved, but this cannot be enforced until the expiration of fourteen days after notice to that effect served on the accused party. This kind of suspension has been already fully spoken of under the subject of Church Discipline.[s]

Suspension while charge is pending.

By canon 122, sentence against a minister of deprivation from his living shall be pronounced by the bishop only, with the assistance of his chancellor and dean (if they conveniently may be had), and some of the prebendaries, if the court be kept near the cathedral church, or of the archdeacon, if he may be had conveniently, and two other at least grave ministers and preachers, to be called by the bishop when the court is kept in other places.

By the canon law sentence of deprivation was to be pronounced by bishop.

In consequence of this canon, Lord Stowell appears to have considered, in the case of *The King's Procurator-General* v. *Stone*, that he had not power to pass sentence of deprivation, and the bishop accordingly came into court for that purpose. And so it was said by Sir J. Nicholl, in one of the cases before mentioned,[t] "It appears to the court, in spite of what has been urged to the contrary, that deprivation is a penalty which it is not at its option

Opinion of Sir J. Nicholl as to the effect of the canon.

[r] *Sanders* v. *Davies*, 1 Adol. 296.
[s] Vide ante.
[t] *Sanders* v. *Davies*.

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to award, that and deposition being specially reserved by the canon to the diocesan. For this, then, if for no other reason, the court declines proceeding to a sentence of deprivation, as prayed by the promovent. It seems also clearly to result that suspension, the proper office of the court, ought not to be carried to any such extent, as to render it tantamount to deprivation; for the court would not be justified in doing that indirectly which it felt itself precluded from doing openly and avowedly by a sentence to that effect."

But Dean of the Arches may deprive.

It appears, however, that in two cases before the Delegates, the exercise of this power by the Dean of the Arches was recognised; and in the before-mentioned case of *Burgoyne* v. *Free*, this power seems actually to have been exercised by the Dean of the Arches. And the difference between suspension and deprivation has been said to consist in this, that the former may be pronounced by the chancellor of the diocese, the latter by the bishop alone, except in the case of the Dean of the Arches, who can even deprive.[u]

Difference in this respect between suspension and deprivation.

The provisions of the recent statute already mentioned, by which clergymen trading illegally, contrary to that statute, are to be suspended for a first or second offence, and to be deprived for a third, appear to be so worded as to render it difficult to say whether it was intended in such a case to give the chancellor power to deprive as well as to suspend; for the bishop is directed to cause the offending party to be cited before his chancellor or other competent judge, and the suspension in the first and second case is to be by the judge; and in the second case at his discretion as to duration; for the third offence, it is said, simply, the offender is to be deprived, and neither the bishop nor any person other than as mentioned in the first two cases appears to have been contemplated; but the same judge is evidently supposed in either of the three cases. It is presumed, however, that the words of the act are not sufficiently clear to confer upon chancellors a power which they did not previously possess.[x]

Whether any alteration has been made in this respect by 1 & 2 Vict. c. 106.

Monition.

It is said that by the ancient canon law, sentence of suspension ought not to be given without a previous admonition, unless where the offence is such as in its own nature requires an immediate suspension; and if sentence of suspension in ordinary cases be given without such previous admonition, there may be cause of appeal.[y]

[u] Dr. Swabey, *arguendo*, 1 Phill. 277; Rogers's E. L. 307; but the point may be considered as by no means clearly settled.

[x] See 1 & 2 Vict. c. 106, s. 31.

[y] Gibs. 1046.

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In all causes of deprivation previously to the Church Discipline Act, where a person was in actual possession of a benefice, these things must have concurred: first, the party must have been cited and admonished to appear; secondly, a charge must have been given against him by way of libel or articles; thirdly, a competent time must have been assigned for his proofs and interrogatories; fourthly, the person accused was to have the liberty of counsel, to defend his cause, to except against witnesses, and to bring legal proof against them; and fifthly, there must have been a solemn sentence by the bishop after hearing the merits of the cause and the pleading on both sides:[a] but the mode of proceeding in every such case will now be entirely regulated by the last-mentioned act. And the mode and effect of an appeal from a sentence pronounced by the bishop have been already spoken of.[a]

Degradation.

Degradation is deprivation *ab officio*, and may take place where there is no benefice of which the party could be deprived; and anciently there appears to have been a mode and regular form by which a clergyman was degraded from his orders;[b] and if any of the clergy had done anything worthy of death or open shame, he was not directly executed, or exposed to death or open shame, but was first degraded by the bishop and his clergy, and so publicly punished, not as a clerk but as a lay malefactor.

In what cases formerly.

Mode of.

But the times are probably long since past when it could have been thought that such a proceeding could save the credit of the order. A case of this kind seems to have occurred in the reign of Charles the First, where in a judgment given against one Dr. Leighton, for publishing a seditious book, it is said as follows: "And in respect the defendant hath heretofore entered into the ministry, and this court, for the reverence of that calling, doth not use to inflict any corporal or ignominious punishment upon any persons so long as they continue in orders, the court doth refer him to the high commission, there to be degraded of his ministry; which being accordingly done, he was set in the pillory, whipped," &c.[c]

And degradation appears to have been performed in the following solemn manner. If the offender was a person in inferior orders, then the bishop of the diocese alone, if in higher order, as priest or deacon, then the bishop of the diocese, together with a certain number of other bishops, sent for the party to come before them. He was brought

[a] 1 Still. 323; 2 Burn's E. L. [a] Ante, Book I. Chap. IV.
[b] Gibs. 1066; and see 2 Burn's E. L. Degradation.
[c] 2 Rushw. 56; Gibs. 1066; 2 Burn's E. L.

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in, having on his sacred robes, and having in his hands a book, vessel or other instrument or ornament appertaining to his order, as if he were about to officiate in his function. Then the bishop publicly took away from him, one by one, the said instruments and vestments belonging to his office, saying to this effect, "This and this we take from thee, and do deprive thee of the honour of priesthood;" and finally, in taking away the last sacerdotal vestment, saying thus, "By the authority of God Almighty, the Father, the Son and the Holy Ghost, and of us, we do take from thee the clerical habit, and do depose, degrade, despoil and deprive thee of all order, benefit and privilege of the clergy."

And this, says Dr. Burn, seemeth to have been done in the most disgraceful manner possible; of which there seem to be some remains in the common expression of pulling a man's gown over his ears.[d]

[d] 2 Burn's E. L. Degradation.

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BOOK VI.

OF THE DUTIES OF A CLERGYMAN OF THE CHURCH OF ENGLAND IN THE DISCHARGE OF HIS HOLY OFFICE.

CHAPTER I.

PUBLIC WORSHIP.

It is not intended in the present chapter to treat of the laws affecting public worship generally; such as the obligation to attend such worship, and other matters relating to the same subject which are now obsolete: but our observations will be confined to that which is included in the purport of the present book; namely, the law by which the conduct of the minister is on such occasions to be regulated.

Uniformity in divine worship.

The law directs that a clergyman is not to diminish in any respect, or to add to, the prescribed form of worship. Uniformity in this respect is one of the leading and distinguishing principles of the Church of England: nothing is left to the discretion and fancy of the individual; for if every minister were to alter, omit, or add according to his own taste, this uniformity would soon be destroyed; and though the alteration might begin with little things, yet it would soon extend itself to more important changes in the public worship of the Established Church; and even in the Scriptures themselves, the most important passages might be materially altered, under the notion of giving a more correct version, or omitted altogether as unauthorised interpolations.[a]

It is essential to the nature of every establishment, and necessary for the preservation of the interests of the laity, as well as of the clergy, that the preaching diversity of opinions should not be fed out of the appointments of the

[a] Sir J. Nicholl, in *Newberry* v. *Goodwin*, 1 Phill. 283.

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Established Church, since the Church itself would otherwise be overwhelmed with the variety of opinions which must, in the great mass of human character, arise out of the infirmity of our common nature; nor is this restraint inconsistent with Christian liberty, for to what purpose is it directed, but to ensure in the Established Church that uniformity which tends to edification, leaving individuals to go elsewhere, according to the private persuasions they may entertain; for if any person dissent, a remedy is provided by the mild and wise spirit of toleration which prevails in modern times, and which allows that he should join himself to persons of persuasions similar to his own.[b]

Established at the Reformation.

This uniformity of public worship, the advantages of which are obvious, appears to have been among the benefits which our Church experienced at the Reformation; for in a statute passed in the second year of Edward VI.[c] it is mentioned that there had been in this realm of England and Wales divers forms of prayer, commonly called the Service of the Church: that is to say, the use of Sarum, of York, of Bangor, and of Lincoln; and after reciting that the Book of Common Prayer, and administration of the Sacraments and other rites and ceremonies of the Church, after the use of the Church of England, had been prepared by the Archbishop of Canterbury and certain discreet bishops and learned men, the same statute enacts, that all and singular ministers in any cathedral or parish church, or any place within this realm, shall be bounden to say and use the matins, evensong, celebration of the Lord's Supper, commonly called the mass, and administration of each of the Sacraments, and of the common and open prayer, in such order and form as is mentioned in the same book, and none other or otherwise.

Establishment of the Book of Common Prayer and its contents by statute.

The statute here spoken of is the first act passed for the establishing uniformity of public worship;[d] and by another act passed in the same reign, some alterations appear to have been made in this book, and a form and manner of making and consecrating of archbishops, bishops, priests, and deacons, was added, and declared to be of like force, authority and value, as the book intituled the Book of Common Prayer was before.

In reign of Elizabeth.

This liturgy, having been abolished by Queen Mary, was again established by an act passed in the first year of Queen Elizabeth, which enacts, that all ministers in any cathedral or parish church, or other place, shall be bound to say and use the matins, evensong, celebration of the Lord's Supper,

[b] Sir J. Nicholl, in *Newberry* v. *Goodwin*, 1 Phill. 283.
[c] Cap. 1. [d] 5 Edw. 6, c. 1.

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and administration of each of the Sacraments, and all the common and open prayer, in such order and form as is mentioned in the book authorised by the parliament in the 5 & 6 Edward VI. with certain trifling alterations or additions not important to be here observed upon.

Establishment of the Book of Common Prayer and its contents by the canon law.

At the close of the reign of Elizabeth were passed the canons of 1603, by the 36th of which it is declared that no person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach or catechize, or be a lecturer or reader of divinity in any place, except he shall first subscribe (amongst others) to this article following, that the Book of Common Prayer, and of ordering of bishops, priests and deacons, containeth in it nothing contrary to the Word of God, and that it may be lawfully used, and that he himself will use the form in the said book prescribed in public prayer and administration of the Sacraments, and none other.

Hampton Court conferences.

The next epoch to which we come in the history of the establishment of our liturgy, is the conference at Hampton Court before James I., in the first year of his reign; and by virtue of the directions given by him to the archbishop and other commissioners to review the Common Prayer Book, several material alterations and enlargements of it were made; but these were not then confirmed by act of parliament.

Final establishment of uniformity of divine worship in reign of Charles II.

The last, and consequently the most important act by which the uniformity of public worship is established, is that passed in the 13th and 14th years of Charles II., which, after reciting, that for settling the peace of the Church, the king had granted his commission under the great seal to several bishops and other divines to review the Book of Common Prayer, and to prepare such alterations and additions as they thought fit to offer; and that afterwards, the convocation of both the provinces being called, his majesty had been pleased to authorise and require them to review the Book of Common Prayer, and the Book of the Form and Manner of making and consecrating Bishops, Priests and Deacons; since which time they had accordingly reviewed the said books, and had made some alterations in the same, which they thought fit to be inserted, and some additional prayers, and had exhibited and presented the same to his majesty in writing, in one book, intituled the Book of Common Prayer, and administration of the Sacraments, and other rites and ceremonies of the Church, according to the use of the Church of England; together with the Psalter or Psalms of David, pointed as they are to be said or sung in churches; and the form and

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manner of making, ordaining, and consecrating of Bishops, Priests and Deacons. It was enacted, that the said Book of Common Prayer, and of the form of ordination and consecration of bishops, priests and deacons, with the alterations and additions so made and presented to his majesty by the said convocations, be the book which shall be appointed to be used by all that officiate in all cathedral and collegiate churches and chapels, and in all chapels of colleges and halls in both the universities, and the colleges of Eton and Winchester, and in all parish churches and chapels throughout the kingdom, and by all that make or consecrate bishops, priests, or deacons, in any of the said places, under such sanctions and penalties as the houses of parliament should think fit.

And it is by the same statute further enacted, that all and singular the ministers in any cathedral, collegiate, or parish church or chapel, or other place of public worship, shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both the Sacraments, and all other the public and common prayers, in such order and form as is mentioned in the said book intituled as aforesaid, and annexed and joined to this present act; and that the morning and evening prayers therein contained shall upon every Lord's day, and upon all other days and occasions, and at the times therein appointed, be openly and solemnly read by all and every minister or curate in every church, chapel, or other place of public worship as aforesaid.

It will be seen, therefore, from these statutes, that independently of any ecclesiastical or canon law, or of any direction of the ordinary which might be binding on the ministers, the Book of Common Prayer, in such order and form as mentioned in the said book, according to the directions of the rubric, is incorporated into and made a part of the statute law of this kingdom; and for the breach thereof the statute law also affixes heavy penalties; for if any parson, vicar, or other whatsoever minister that ought to sing or say common prayer, or minister the Sacraments, refuse to do so in such order and form as set forth in the Book of Common Prayer, or shall wilfully and obstinately use any other rite, ceremony, form, &c., in celebrating the Lord's Supper, or other open prayer; or shall preach or speak anything in the derogation of the said book, or any thing therein contained, and be thereof convicted, either by verdict of twelve men or by his own confession, or by notorious evidence of the fact, he shall forfeit (if the prosecution is upon 2 & 3 Edw. VI.), for his first offence, the

Punishment for refusing to read the Common Prayer, &c., according to the prescribed form.

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profit of such one of his spiritual benefices as it shall please the king to appoint, and also be imprisoned six months; and for the second offence be imprisoned for a year, and be deprived of all his spiritual promotions; and for the third offence be imprisoned for life. If the prosecution be made under the 1 Eliz. c. 2, then for the first offence he shall forfeit to the king the profit of all his spiritual promotions for one year, and be imprisoned six months for the second offence, as by 2 & 3 Edw. VI.; for the third offence, be deprived of all his spiritual promotions, and be imprisoned for life; and if he have no spiritual promotions, then for the first offence imprisonment for a year, for the second, imprisonment for life.

To what cases the above statutes are applicable.

Upon these statutes a clergyman was indicted at the quarter sessions in Devonshire in the year 1685 for using *alias preces* in the church, and *alio modo* than mentioned in the Book of Common Prayer; and the indictment concluded *contra formam statuti*, &c. He was found guilty; and fined 100 marks. Upon writ of error, it was admitted, that offences against these statutes might be inquired of by the justices; but the indictment was held bad; for that it ought to have alleged that the defendant used other forms and prayers instead of those enjoined, which were neglected by him; for that otherwise any person might be indicted, who used prayers before his sermon other than such as are required by the Book of Common Prayer.[e]

Jurisdiction of justices of the peace.

Although this decision established that justices had jurisdiction in such cases, and that indictments, properly framed for offences against these statutes, might be inquired of by them, yet it is probable that indictments of this nature have been very rarely if ever preferred; for the jurisdiction of the ecclesiastical court was in no way taken away by those statutes.[f] And wherever it may have been necessary to institute any penal proceedings against clergymen for the omission of, or addition to, any thing contained in the Book of Common Prayer, the proceeding has probably been always in the ecclesiastical court. And, indeed, prosecutions in the temporal courts upon those statutes seem to have been discouraged by the judges; for in a case at the Thetford Lent assizes in 1795 a clerk was indicted upon these statutes; but the evidence was not that he left out or added any prayers, or altered the form of worship, but that he did not read prayers twice on a Sunday, but

Of judges at the assizes.

[e] *R. v. Sparkes*, 3 Mod. R. 79. But the reason here given appears unsatisfactory; and it certainly must not be taken to mean that a clergyman might with impunity use any prayer before his sermon, at his discretion, and which was not to be found in the Book of Common Prayer.

[f] 3 Burn's E. L. 257.

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alternately, one Sunday in the morning, and the next in the evening, and omitted to read them at all on certain saints' days. Mr. Baron Perryn, who tried the indictment, observed, that it was *primæ impressionis*, and being of opinion that the offence complained of was purely of ecclesiastical cognizance, and not the subject of prosecution in the temporal courts, directed the jury to acquit the defendant, which they accordingly did. And a clear and special mode of proceeding being now pointed out by the recent act for the better enforcing church discipline, of which we have already spoken, all others will now probably become obsolete. It appears obvious, however, that in whatever court or in whatever manner may be the proceeding, a rigid interpretation of these statutes, much less an actual enforcement of the penalties mentioned in them, is not to be insisted on; and as it may be presumed that the bishop would be guided, in the exercise of his discretionary power, under the Church Discipline Act, by what in similar cases may have been the practice of the ecclesiastical court, the words of Sir J. Nicholl, in the case of *Newberry* v. *Godwin*,[s] may furnish a sound and useful precedent. In giving judgment in that case, he says, "The third article pleads generally that the defendant frequently leaves out portions of the Holy Scriptures appointed to be read; and often acknowledges that he has done so, and declares that he will do so again. The fourth article pleads a specific instance, viz. that on the preceding Sunday he omitted part of a verse in the first lesson; and if the fact had happened simply (though, strictly speaking, it is not legally justifiable to omit any part), yet probably the suit would not have been brought; but the article proceeds to state that after he had omitted the verse, he looked round to the pew of F. Newberry and said, 'I have been accused by some ill-natured neighbour of making alterations in the service; I have done so now, and shall do so again wherever I think it necessary; therefore mark.' This gives a very different colour and complexion to the act; the omission seems to have been made, not from feelings of delicacy, which, though not a legal justification, would greatly extenuate the omission; but the omission seems to have been selected as affording a favourable opportunity of asserting the general right, and even of reflecting, in the midst of the service, upon those who questioned the general right. The violation, therefore, of the law was aggravated by circumstances which render the correction of the offence necessary and proper. If this article should be proved, it will not

Such proceedings should now be under the Church Discipline Act.

To what extent the above statutes would be acted on.

Case of *Newberry* v. *Godwin*.

[s] 1 Phill. 282.

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only subject the party to admonition, but, further, to the payment of costs.

What may be said or given out by the minister during the time of divine service.

The Book of Common Prayer, therefore, is to be used according to the form directed by the rubric; and such declarations as by that rubric are ordered to be made by the minister, to which we must add publication of banns of marriage, as enjoined by special act of parliament, or matters enjoined by the king or the ordinary, are alone permitted to be used or given out in the church by any minister during divine service.

Publication of various matters, formerly made in the church, is now forbidden.

Formerly, many notices or publications relating to parochial matters, holding courts, &c., were by custom, or by express acts of parliament, given out during the time of, or immediately after, divine service; but by a recent statute it is enacted,[h] that no proclamation, or other public notice for a vestry meeting, or any other matter, shall be made or given in any church or chapel during or after divine service, or at the door of any church or chapel at the conclusion of divine service. And that all proclamations and notices, which by virtue of any law or statute, or by custom or otherwise, have been heretofore made or given in churches or chapels during or after divine service, shall, instead thereof, previously to commencement of divine service on the several days on which such proclamations have hitherto been made, be affixed on or near the doors of all the churches and chapels within such parish; and that no decree relating to a faculty, nor any other decree, citation, or proceeding whatsoever in any ecclesiastical court, shall be read or published in any church or chapel during or immediately after divine service. The act contains a proviso that nothing contained in it shall extend to the publication of banns, nor to notice of the celebration of divine service, or of sermons; nor to restrain the curate, in pursuance of the Book of Common Prayer, from declaring unto the people what holyday or fasting days are in the week following to be observed; nor to restrain the minister from proclaiming or publishing what is prescribed by the rules of the Book of Common Prayer, or enjoined by the queen or ordinary of the place; a great part of which proviso, it will be seen, is merely an affirmance of the directions of the rubric, and a declaration that they are to be obeyed, and that they are not interfered with by this act.

Of what matters publication is still allowed.

Times and seasons at which the common prayer is appointed to be read.

Having now ascertained what is to be read in our churches, we next proceed to inquire at what times and seasons this is appointed to be done.

[h] 1 Vict. c. 45.

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The common prayer shall be said or sung distinctly and reverently upon such days as are appointed to be kept holy by the Book of Common Prayer, and their eves; and at convenient and usual times of those days, and in such place of every church as the bishop of the diocese, or ecclesiastical ordinary of the place, shall think meet for the largeness or straitness of the same, so as the people may be most edified.[i]

And this, it is supposed, is the law of the Church at the present day, however much the former part of it may be disregarded in practice. And if the bishop should in his discretion think fit to enforce the performance of divine service on those days appointed to be kept holy by the Book of Common Prayer, and on their eves, there seems no doubt but that he would be authorised so to do, and in such manner as directed by the 57 Geo. III. c. 99, s. 51, to be presently mentioned.[k]

Holidays and their eves.

"By the general law, the church service, according to the form prescribed in the Book of Common Prayer, is to be regularly performed every Sunday in the morning and evening. If less duty is required, any relaxation must be adopted, with the approbation of the diocesan, who is to judge of the degree to be allowed; and the minister must strictly adhere to the terms prescribed, and not vary them for his own convenience."[l]

Amount of regular Sunday duty, how relaxation from is to be obtained.

The above words are from the judgment of Sir W. Scott, who in the same case observed, "It is not likely, *nor would it be proper*, that the parish should complain of occasional accidental omissions."

The number of services, however, to be performed in any church in his diocese, depends entirely on the discretion of the ordinary; for while it is enacted by divers statutes, that the bishop may enforce the performance of certain services, he is nowhere forbidden from granting any relaxation in this respect that he may think fit.

Power of the ordinary in this respect.

Thus by 57 Geo. III. c. 99, it is enacted, that the bishop of the diocese may (but not that he is bound to) enforce the performance of the morning and evening service on Sundays, or any other service required by law in any parish church or chapel, or extra-parochial church, by monition and sequestration issued as in that statute is provided.

It does not appear to have been the intention of this statute, to make any alteration in the existing law as to the power of bishops to enforce the proper performance of the services, but only to point out more particularly a

[i] Canon 14. [k] Vide infra. [l] *Bennett* v. *Bonaker*, 1 Hagg. Eccl. 25.

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specific mode of proceeding; and therefore the other services required by law here mentioned, would certainly include those before-mentioned in the 14th canon, namely, those upon such days as are appointed by the Book of Common Prayer to be kept holy, and their eves. A further question might arise, whether under these words the bishop would be enabled to enforce daily service; that is, whether the directions of the rubric are sufficiently clear in ordering that the morning and evening prayers shall be used *every* day throughout the year. There appears however to be little difficulty in arriving at the conclusion that he could not. And that, however desirable it may be in places where a sufficient congregation could be collected that daily service should be performed, yet that the only times at which its performance could legally be enforced, are such times as are specified in the canon law abovementioned and in the statutes. The Book of Common Prayer furnishes us with a form of *daily* service throughout the year. And if it were not so, there would be no legal form of service which could ever be performed daily, however great the emergency; but there is no direction in the rubric, nor can any inference be drawn from it, that this was to be used daily in every church. And it will be remembered, that it is the rubrical directions only that are to be considered as law: and that some other directions or expositions, which are to be found printed in some of our books of Common Prayer, have no legal force or validity whatsoever. The directions of the canon may be deemed decisive of the question; for it is there directed, that the Common Prayer shall be used, &c. on such days as are appointed to be kept holy; a direction which would plainly have been absurd, if the Common Prayer had been intended to have been used on every day, whether appointed to be kept holy or not. By the rubric the curate is required to give notice of these days; but this would have been altogether unnecessary, if the people were every day to resort to church. The same argument is suggested by the directions of the 15th canon, which directs, that on Wednesdays and Fridays, *though they be not holidays*, the minister, at the accustomed hour of service, shall resort to the church or chapel, and warning being given to the people by tolling a bell, shall say the litany, &c. This direction as to Wednesdays and Fridays would have been unnecessary and superfluous, if the minister should have resorted there every day; but the words above printed in italics remove all possible doubt, for they clearly show,

Could the bishop enforce the performance of daily service?

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that but for this direction even the Wednesdays and Fridays, if they were not holidays, would not have times when the service would have been performed; and that the holidays only would have been such proper times. Accordingly, as far back as we have any clear and authentic evidence, at the close of the seventeenth and the beginning of the eighteenth century, we find that in and about London, where it may be supposed the congregation was found sufficient, the Wednesdays, Fridays and holidays were the days, and the only days besides Sundays, when the service was performed; in which practice there appears to have been a great degree of uniformity: but it would appear, the service on the eves of the holidays is also proper, and might be legally enforced. But no action for damages will lie against a minister for refusing to celebrate divine service.[m]

While the bishop may, as we have seen, permit any relaxation from the two Sunday services, he may on the other hand, if he see proper, direct the performance of three services in any church within his diocese; for by the 58 Geo. III. c. 45, it was enacted, that wherever it should appear to the bishop of the diocese that churches or chapels, whether at that time existing, or built under the provisions of that act, would not afford sufficient accommodation for the parishioners or inhabitants to attend divine service, and he should be of opinion that it would be expedient that additional accommodation should be provided for that purpose, and that such purpose would be answered by the celebration on Sundays and on the great festivals of a third or additional divine service, being either the morning or evening service, as he might direct, with a sermon, it should be lawful for him to require the incumbent of every such parish to nominate to him a proper person to be licensed to serve as a curate for the performance of such third service, with a sermon; in which case such incumbent, within six months after such requisition, must nominate the curate; and in default of his so doing, the bishop may nominate and license a proper curate for the purpose.[n]

Bishop may enforce the performance of a third service on Sundays and holidays in certain cases.

And appointment of a curate for that purpose.

And the bishop is empowered to require the churchwardens to let for such third service such proportion of the pews and at such rates as in his opinion shall be sufficient to afford a complete salary to the curate; and the churchwardens are empowered by the act to let the same, provided they are not held by faculty or prescription; and

Salary of such curate may be paid by rent of pews.

[m] 5 Rep. 72 b. [n] Sect. 65.

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reserving such number of sittings as free seats, not being less than one fourth, as the bishop may think expedient.[o]

Or by subscription of the parishioners.

But if the parishioners or inhabitants are willing to raise a subscription for payment of the salary to the curate, and it appears to the bishop that such mode of providing the salary is more expedient than that of pew rents, it may be adopted.[p]

Amount of salary.

The salary to be given to such curate for the performance of the additional service is not to exceed the sum of 80*l.* per annum, except when raised entirely by subscription; in which case no limit is assigned.[q]

Bishop may enforce two full services, with a sermon on Sundays.

By a more recent act[r] the bishop is empowered to order that there shall be two full services, each of such services, if he shall so direct, to include a sermon or lecture on every Sunday throughout the year, or any part thereof, in the church or chapel of every or any benefice within his diocese, whatever may be the annual value or the population thereof; and also in the church or chapel of every parish or chapelry, where a benefice is composed of two or more parishes or chapelries in which there shall be a church or chapel, if the annual value of the benefice arising from that parish or chapelry shall amount to 150*l.*, and the population of that parish or chapelry shall amount to 400 persons: provided that nothing therein contained shall be taken to repeal or affect the provisions of the act of the fifty-eighth year of George III., intituled "An Act for building and promoting the building of additional Churches in populous Parishes" (the act before mentioned), by which the bishop of any diocese is empowered to direct the performance of a third or additional service in the several churches or chapels within his diocese, under the circumstances therein mentioned.[s]

The object and effect of this last enactment considered.

The object of this enactment, as it appears, could only have been with reference to the sermon or lecture, of which we shall speak hereafter; but instead of being confined to this, it will be observed that it re-enacts what by the canon law and by the statute before mentioned the bishop was previously clearly empowered to do, and confusion may probably arise from the want of sufficient attention to what was previously the law. It is presumed, however, that it could not have been the intention of the legislature, by conferring on the bishop of the diocese, as to Sundays, a power which he already possessed, to limit in any degree the power also possessed by him of enforcing divine service on other days appointed by the canon law and by the

[o] Sect. 65. [p] Ibid. [q] Sect. 66.
[r] 1 & 2 Vict. c. 106. [s] Sect. 80.

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Book of Common Prayer for that purpose; although the exception contained in the proviso, that one previous enactment only, without mention of any other or of the canon law, was to remain as before, may have led some parties to an opposite conclusion.

No clergyman to serve more than two benefices in one day.

There is a further direction in the last-mentioned statute, that no spiritual person shall serve more than two benefices in one day, unless in case of unforeseen and pressing emergency; in which case the spiritual person who shall so have served more than two benefices shall forthwith report the circumstance to the bishop of the diocese.[t]

Public preaching.

Public preaching, which, according to the 23d Article of the Church of England, it is not lawful for any man to take upon himself before he is lawfully called and sent to execute the same, is now an important part of public worship. It would appear from the canon law by which this was regulated that preaching was formerly considered as a dangerous power committed to ministers, on which it was necessary to keep a jealous eye. Probably many of the clergy were not well affected to the Reformation; none therefore were permitted to preach without license; but they were to study and read the homilies gravely and aptly, and they that were instituted subscribed a promise to the same effect. The canon law on the subject is as follows.

License to preach.

"No priest, not being licensed, shall exercise the office of preaching until he shall be examined and sent by the bishop, and shall produce the authority by which he preacheth. No person shall be received into the ministry, nor admitted to any ecclesiastical living, nor suffered to preach, to catechize, or to be a lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city, or market town, parish church, chapel, or any other place within this realm, except he be licensed either by the archbishop or by the bishop of the diocese where he is to be placed, under their hands and seals, or by one of the two universities, under their seal likewise; and except he shall first subscribe to the three articles concerning the king's supremacy, the Book of Common Prayer, and the Thirty-nine Articles: and if any bishop shall license any person without such subscription, he shall be suspended from giving licenses to preach for the space of twelve months."[u]

Simony in procuring.

And by the 31 Eliz. c. 6, "If any person shall receive or take any money, fee, rewards or any other profits, directly or indirectly, or any promise thereof, either to himself or any of his friends, (all ordinary and lawful fees

[t] Sect. 106. [u] Canon 36.

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only excepted,) to procure any license to preach, he shall forfeit 40*l.*"

But the following canons show more particularly the careful anxiety of the Church on this head.

Minister, churchwardens, &c. not to suffer any to preach without license.

"Neither the minister, churchwardens, nor any other officers of the Church, shall suffer any man to preach within their churches or chapels but such as, by showing their license to preach, shall appear unto them to be sufficiently authorised thereunto as is aforesaid."[x]

Deans, presidents, &c. not to suffer strangers to preach, and to take notice of heretical doctrines.

"The deans, presidents and residentiaries of any cathedral or collegiate church shall suffer no stranger to preach unto the people in their churches except they be allowed by the archbishop of the province, or by the bishop of the same diocese, or by either of the universities; and if any in his sermon shall publish any doctrine either strange or disagreeing from the Word of God, or from any of the Thirty-nine Articles, or from the Book of Common Prayer, the dean or residents shall, by their letters subscribed with some of their hands that heard him, so soon as may be, give notice of the same to the bishop of the diocese, that he may determine the matter and make such order therein as he shall think convenient."[y]

Churchwardens to keep a book, and enter names of preachers in it.

"That the bishop may understand (if occasion so require) what sermons are made in every church of his diocese, and who presume to preach without license, the churchwardens and sidemen shall see that the names of all preachers which come to their church from any other place be noted in a book, which they shall have ready for that purpose, wherein every preacher shall subscribe his name, the day when he preached, and the name of the bishop of whom he had license to preach."[z]

Churchwarden punishable for neglect of this duty.

And formerly a churchwarden has actually been committed to gaol by justices of the peace for permitting one who was a stranger to preach in his church without having first demanded to see his license, although in fact the preacher was duly licensed, and the commitment was held good.

The above canons now obsolete.

But the reasons for the great strictness formerly enjoined having ceased, the directions of the various canons in this respect are no longer acted upon; the inquiries made by the churchwardens of strange preachers, and the entries by them in books for that purpose, have generally long since fallen into disuse, although such books are still to be found kept in some churches.

Whether a license from the bishop of the

Although a minister has been duly ordained, yet he may not preach without license either of the king, or archbishop

[x] Canon 50. [y] Canon 51. [z] Canon 52.

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or bishop, or other lawful ordinary, or of one of the universities of Oxford or Cambridge.[a] But an allowance by the bishop of any diocese has been held sufficient, although his allowance be only to preach within his diocese;[b] for the statute, it is said, does not require any allowance by the bishop of the diocese where the church is. Watson, speaking of this decision, adds: "This is only to be intended so as to satisfy the words of the statute, as not to be punished by them for want of a license to preach; for I take it, a preacher by the canon is obliged to procure a license from the bishop where the church is, notwithstanding any license obtained from another bishop; and this is agreeable to the words used in the form of ordaining priests, which are, 'Take thou authority to preach the Word of God and to minister the Holy Sacraments in the congregation where thou shalt be lawfully appointed thereunto.'" In the case of *Dr. Trebec* v. *Keith*, decided in 1742,[c] it was said by Lord Hardwicke, "As to preaching, there is no pretence for doing it without license from the bishop, for the canons of 1603, confirmed by act of parliament, are express as to that matter. It is not necessary, indeed, for a minister to have a license from the bishop of the diocese for every particular case; but the bishop may suspend him wholly if he is irregular."

diocese in which the church is situate is necessary to enable a minister to preach therein.

By the words "every particular case" there seems here to be intended every particular case within the diocese; and the words "bishop of the diocese" are incapable of any other construction than bishop of the diocese where the church is.

Provisions have recently been made for allowing bishops or ministers of the Protestant Episcopal Church of Scotland, and also of the Protestant Episcopal Church of the United States of America, to officiate occasionally, under certain restrictions, in the churches and chapels of the Church of England and Ireland; but any bishop or minister must obtain the permission in writing of the bishop of the diocese wherein the church or chapel is situate; but such permission, although it may be renewed, must only be for any one day or any two days, which are to be specified in the written permission; and such permission will authorise the bishop or minister to whom it is given to perform divine service, preach, or administer the Sacraments.[d]

Bishops or clergy of Scotland or United States may officiate in England under certain restrictions.

No such permission is to be given unless the party applying for it shall first produce to the bishop of the dio-

[a] See ante.
[b] *Brown* v. *Spence*, 1 Keble, 503.
[c] 2 Atkyns, 498.
[d] 3 & 4 Vict. c. 33, s. 1.

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cese letters commendatory, given within six months before; which must be, in the case of a bishop, under the hands and seals of two other bishops of the Church to which he belongs; and in the case of a priest, under the hand and seal of the bishop of the district where he usually resides; and also a testimonial, similarly signed in either case, that the party applying is a person of godly life and conversation, and professes the doctrines of the United Church of England and Ireland.[e]

The consent of the incumbent of the parish, &c. will of course in every such case be essential.[f]

Penalties for allowing unauthorised persons to officiate.

If any incumbent or curate shall allow any bishop or priest, as last mentioned, without such written permission, or shall allow any other bishop, priest, &c., not of the United Church of England and Ireland, to officiate in the church or chapel of which he is incumbent or curate, he shall for the first offence be liable to be called before the bishop of the diocese in person, and be publicly or privately monished at the discretion of the bishop; and for every subsequent offence he shall, if a curate, be liable to be removed or temporarily suspended from his curacy at the discretion of the bishop; or if an incumbent, he shall, on proof of his offence in due course of law, be suspended *ab officio et à beneficio* for any time not exceeding three months, or be subject to other ecclesiastical censures.[g] And a penalty of 50*l.* is imposed on the party illegally officiating, which is to be paid to Queen Anne's Bounty, and to be recovered by action of debt brought in the name of the treasurer.[h]

Deacons not ordained in England or Ireland.

Persons not having been ordained deacons by any bishop of the United Church of England and Ireland may hereafter be ordained priests by any such bishops, but are not to be thereby enabled to officiate within England or Ireland, except under the provisions of this act above mentioned;[i] and all admissions to benefices, curacies, &c. contrary to the act, are null and void.[k]

The Church in our colonies is considered, for the purposes of this act, as the Church of England.[l]

Punishment by statute for heretical preaching, &c.

Though the strict surveillance over preachers of the Established Church, which seems to have been thought necessary formerly, is no longer practised, yet ample power exists to punish those ministers who may abuse the liberty now allowed; for it is enacted by the 13th Eliz. c. 12, that if any person ecclesiastical, or who shall have any ecclesiastical living, shall advisedly maintain or affirm any doc-

[e] Sect. 2. [f] See ante, Book I. Chap. VII. Sect. 9.
[g] Sect. 4. [h] Sect. 5. [i] Sect. 6. [k] Sect. 7. [l] Sects. 4, 5.

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trine directly contrary or repugnant to any of the articles of the Church of England, and being convened before the bishop or ordinary, shall persist therein, or not revoke his error, or after such revocation eftsoons affirm such untrue doctrine, he shall be deprived of his ecclesiastical promotions.

Which statute is in full force at this day.

Upon this statute a clergyman was cited in a criminal proceeding in the ecclesiastical court, in 1808,[m] for advisedly maintaining or affirming doctrines contrary or repugnant to the articles of Scripture: and it was said by Sir William Scott, in giving judgment in that case, "that it was quite repugnant to the purpose for which the articles were designed, and to all rational interpretation, to contend that the construction of the articles should be left to the private persuasion of individuals; and that every one should be at liberty to preach doctrines contrary to those which the wisdom of the State, aided and instructed by the wisdom of the Church, had adopted. That it was the idlest of all conceits that this was an obsolete act; that it was in daily use, *in viridi observantiâ*, and as much in force as any in the whole statute book; and repeatedly recommended to our attention by the injunction of almost every sovereign who had held the sceptre of these realms. That as to preaching, it should be according to those doctrines which the state had adopted, as the rational expositions of the Christian faith. That it was of the utmost importance that this system should be maintained: for what would be the state and condition of public worship if every man was at liberty to preach from the pulpit of the church whatever doctrines he might think proper to hold? Miserable would be the condition of the laity if any such pretension could be maintained by the clergy. That any clergyman could assume the liberty of inculcating his own private opinions, in direct opposition to the doctrine of the Established Church, in a place set apart for its own public worship, was not more contrary to the nature of a National Church, than to all honest and rational conduct. At the same time," he says, "I think myself bound to declare, that it is not the duty nor inclination of this court to be minute and rigid in applying proceedings of this nature, and that if any article is really a subject of dubious interpretation, it would be highly improper that this court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding

Words of Lord Stowell on this subject.

In what cases the statute would be enforced.

[m] *Her Majesty's Procurator General* v. *Stone*, 1 Hagg. Consist. Rep. 424; and see ante.

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its interpretation.[n] It is a very different thing where the authority of the articles is totally eluded, and the party deliberately declares the intention of teaching doctrines contrary to them." And after referring to the particular case before him, which had been clearly proved, he says, "The court cannot refuse its authority to carry into effect the statutes of the land. It might proceed immediately, as suggested by the king's advocate, after the persisting in those doctrines which we have heard this day, to pronounce the sentence of the law. But the court is disposed to act with the greatest indulgence to the party, and will now content itself with admonishing him to appear the next court day to revoke his errors; with an intimation, that if he does not obey this admonition, the court will feel itself under the necessity of proceeding to inflict the particular penalty which the statute directs." Accordingly, on the next court day, Mr. Stone, the party proceeded against, tendered the following paper: "I, Francis Stone, rector of Cold Norton, in the county of Essex, do declare, that I was not aware that, by preaching my sermon before the archdeacon, I was offending against an act of parliament passed in the reign of Queen Elizabeth; and further, I was persuaded that my solemn engagements with the bishop at my ordination as priest authorised me to preach as I did. But as the act of parliament affirms that I should preach only what is consistent with the Thirty-nine Articles, I do promise not to offend in like manner."

Penalties of the statute enforced against a clergyman refusing to revoke his errors.

This, Sir William Scott observed, it was not in his power to accept as a revocation: for that it was in fact directly the reverse; that there was no difficulty in framing what the statute required; for it was plainly an assurance that the party who had offended against the statute revoked his errors. And, considering that Mr. Stone had not revoked his errors, or complied with the requisition of the statute, he directed the registrar to record that the party had not revoked his errors; and sentence of deprivation was in consequence pronounced by the bishop in the usual manner.[o]

Habit of the officiating minister.

As to the habit to be worn by the officiating minister, there seems to be some slight, or it may be only an apparent, variance between the canon and the statute law. The canon law directs, that every minister saying the public prayers, or ministering the sacraments or rites, shall wear a decent and comely surplice with sleeves, to be provided,

[n] The above words of Lord Stowell appear intended to have a wide and general application.

[o] See ante, "Deprivation."

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as we have before seen,[p] at the charge of the parish; any question as to decency or comeliness thereof to be decided by the ordinary;[q] and ministers, being graduates, are to wear upon such surplices such hoods as by the orders of the universities are agreeable to their degrees, which no minister, not being a graduate, shall wear on pain of suspension. But ministers, not being graduates, may wear, instead of hoods, a decent tippet of black, so it be not of silk.[r]

Being a graduate.

But in the rubric of the Common Prayer Book, established by act of parliament in the second year of Edward the Sixth, it is directed, that in saying or singing of matins and evensong, baptising, and burying, the minister in parish churches, and chapels annexed to the same, shall use a surplice; and in all cathedral churches and colleges, the archdeacons, deans, provosts, masters, prebendaries and fellows, being graduates, may use in the choir, besides their surplices, such hoods as pertain to their several degrees, which they have taken in any university within this realm; but, in other places, any minister shall be at liberty to use any surplice or not. It is also seemly that graduates, when they preach, should use such hoods as pertain to their several degrees. This is the present statute law upon this subject. For by the 1 Eliz. c. 2, and also by the rubric before the Common Prayer, which, as we have before seen, is a part of the statute law, it is directed that such ornaments of the Church, and of the ministers thereof, shall be retained and used, as were in the Church of England, by authority of parliament, in the second year of Edward the Sixth.

On what occasions the surplice is to be worn.

Where the statute law is opposed to the canon law, the latter would seem to be null; and as the statute law has not mentioned the solemnization of marriage, or the churching of women, as occasions on which the surplice is to be worn, it was probably at that time considered optional; and although custom has now strongly sanctioned its use upon such occasions, it must be doubtful whether it could be legally enforced. The administration of the Holy Communion is omitted in this part of the rubrical directions from the occasions on which the surplice is to be used; but it is directed in another part of that same Prayer Book, that the vesture worn on such occasions shall be a plain white alb, with a vestment or cope. This alb differs very little from the surplice, being close-sleeved; and indeed in the same place, where directions are given for the habit of the bishop in officiating at the ministration of the Communion, it is said that he shall have upon him, among

Solemnization of marriage; churching of women; administration of the Sacrament.

[p] See ante, "Ornaments of the Church." [q] Canon 58. [r] Ibid.

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The alb at the communion service.

other things, his surplice or alb. And a difficulty might consequently here arise, if custom should in any case be so far disregarded, as that a minister should take upon himself to adopt an alb instead of a surplice in the administering the Sacrament; for the alb is in fact the only habit which the strict letter of the law sanctions on such occasions. Nor does it appear that the bishop would have authority to order any other. And this appears to be one of the many cases in which numerous difficulties would arise from any departure from custom and long established usage.

Surplice not to be used in preaching.

As to the use of the surplice as a proper habit for the preacher, it never appears to have been even contemplated either by the canon or the statute law; the directions of which appear so plainly to indicate the different times at which the surplice is to be used, that it is not easy to imagine in what manner an opinion could have prevailed that its use had ever been considered proper in the pulpit. The error may possibly have arisen from the custom, which would be in strict accordance with the canon, for the deans, masters, prebendaries, fellows, &c. in cathedrals or colleges, to wear their surplices while preaching in their own cathedral or college; but these they wear on such occasions not as preachers, or as persons ministering, but because it is the ordinary dress which they are by the canon directed to wear, and which they do always wear when they attend their cathedral or college church or chapel, whether ministering, or as members of the congregation only; and which surplices even lay fellows of colleges ordinarily wear when attending service at their college chapels. Others have supposed this error to have arisen from the circumstance, that the rubric may possibly be so construed as to suppose the morning sermon to be a part of the order of the administration of the Lord's Supper, which however would involve the manifest absurdity of using a different habit in performing precisely the same office according to the time of the day at which it might be performed; but, in truth, the meaning of "preaching being a part of such a service" is not very clear or definite: and even if it were so in the fullest sense, yet, as it is clearly not performed in the same place, there is no argument that it should be in the same habit. It will, moreover, be observed, that it is doubtful whether the use of the present surplice in the communion service has any other certain sanction than the authority of that long established custom which has also sanctioned the use of the gown in preaching. It would seem therefore to be the duty of the ordinary to

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prohibit the use of the surplice upon every occasion where it is not sanctioned either by usage or by law.

Manner in which the church service is to be performed.

We have already seen that the general order of the church service, according to the directions of the rubric, is not to be departed from by the minister; but the manner in which that church service is to be performed is at the direction and discretion of the officiating minister, subject, of course, to any directions from the ordinary: and so long as he does not depart from the directions of the rubric, the parishioners or churchwardens,[s] or others, would have no right to interfere; as where it is directed by the rubric that such a particular part of the service is to be said or sung, it would be for the minister, at his discretion, to choose which alternative should be adopted, according as he might think best adapted to his congregation.

Discretionary power of the minister in ordering singing, chanting, &c. in his church.

Sir William Scott, in his judgment in the case of *Hutchins* v. *Denziloe*,[t] which we have before quoted, when speaking of the duties of churchwardens, considers the discretion of a minister, who had introduced the chanting a part of the service into a parochial church, as questionable; but the judgment expressly declares that there is nothing in point of law to prevent his so doing, and that any interference or countermand by the churchwardens is illegal and punishable: and as the minister is to direct, at his discretion, what parts of the service are to be sung, and to exercise a general superintendence in such matters, it follows that he may direct by whom the singing or chanting are to be principally performed, whether it is to be instrumental or vocal only, and, in fact, to make any new orders or regulations relating thereto as he may think fit; but subject, as we have already mentioned, to the general controling power of the ordinary; to whom, consequently, the churchwardens or parishioners, or any of them who may feel aggrieved by such new orders and regulations, ought to address their complaint.

In appointment or dismissal of singers, &c.

It follows, therefore, from what is here said, that the appointment or dismissal of singers or instrumental performers in the church rests entirely with the minister, who might dismiss them individually or as a body, appoint a different method or prohibit singing altogether, if he thought proper; subject, however, as we have already observed. And if any after dismissal should persist, nevertheless, in continuing to perform or sing as before, it is presumed they would be liable to be punished under the statute of William III., presently to be mentioned, as wilful disturbers of the congregation.

[s] See ante, "Churchwardens." [t] 1 Hagg. Consist.; vide supra.

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It would not be easy to lay down any rule for the guidance of ministers in a matter which is peculiarly within their own discretion, and depending so entirely upon the circumstances of each particular case; but each, according to those circumstances, may probably be able to find a guide in the following brief summary of the history of this subject, which we have here given in the words of Lord Stowell:[u] "In the primitive Churches the favourite practice of the Christians to sing hymns in alternate verses is expressly mentioned by Pliny, in one of his epistles to the Emperor Trajan: *Affirmabant hanc fuisse summam vel culpæ suæ vel erroris, quod essent soliti stato die ante lucem convenire carmenque Christo quasi Deo dicere secum invicem;*[x] and probably for some time the custom continued much as we find the rule laid down in this country about 1000 years ago; viz. that they *should observe a plain devout melody.*[y]

History of church singing.

"The Church of Rome afterwards refined upon this practice, as it was their policy to make their ministers considerable in the eyes of the common people; one way of effecting that, was by appointing them sole officers in the public service of the church, and difficult music was introduced, which no one could execute without a regular education of that species. At the Reformation this was one of the grievances complained of by the laity, and it became the distinguishing mark of the Reformers to use plain music in opposition to the complex musical services of the Catholics. The Lutheran Church, to which the Church of England has more conformed in discipline, retained a choral service. The Calvinistic Churches, of which it has sometimes been harshly said that they think to find religion wherever they do not find the Church of Rome, have discarded it entirely, with a strong attachment to plain congregational melody, and that, perhaps, not always of the most harmonious kind.

At the time of the Reformation.

"There are certainly, in modern usage, two services to be distinguished; one the cathedral service, which is performed by persons who are in a certain degree professors of music, in which others can join only by ear; the other, in which the service is performed in a plain way, and in which all the congregation nearly take an equal part. It has been argued that nothing beyond this ought to be permitted in ordinary parochial service, it being that which

In modern usage.

[u] The following is from the judgment of Lord Stowell in the case of *Hutchins* v. *Denesiloe*, ante.

[x] Epis. x. 97. [y] Gibs. 298.

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general usage at the present day alone permits. But that carries the distinction further than the law will support; for if inquiries go further back, to periods more nearly approaching the Reformation, there will be found authority sufficient, in point of law and practice, to support the use of more music even in a parish church or chapel.

"The first Liturgy was established in the time of Edward VI., in 1548. This was followed, after a lapse of four years, by a second, which was published in the reign of the same king, in 1552; and the third, which is in use at present, agreeing in substance with the former, as ordained and promulged in the first year of Elizabeth, in 1559.

"It is observable that these statutes of Edward VI., which continue in force, describe even-service as even-song. This is adopted into the statute of the first of Elizabeth. The Liturgy also of Edward VI. describes the singing or saying of even-song; and in the communion service the minister is directed to sing one or more of the sentences at the offertory. The same with regard to the Litany; *that* is appointed to be *sung*. In the present Liturgy, the Psalter is printed with directions that it should be *said* or *sung*, without any distinction of parish churches or others; and the rubric *also* describes the Apostles' Creed to be *sung* or *said* by the minister and people, not by the prebendaries, canons and a band of regular choristers, as in cathedrals, but plainly referring to the service of a parish church. Again, in the burial service, part is *to be sung* by the minister and people; so also in the Athanasian and Nicene Creeds.

"The injunctions that were published in 1559 by Queen Elizabeth completely sanction the continuance of singing in the church, distinguishing between the music adapted for cathedral and collegiate churches and parochial churches; for it is enjoined that, because in divers collegiate, as also in some parish churches, heretofore there hath been livings appointed for the maintenance of men and children for singing in the church, by means whereof the laudable exercise of music hath been had in estimation and preserved in knowledge, the queen's majesty, neither meaning in anywise the decay of anything that might conveniently tend to the use and continuance of the said science, neither to have the same so abused in any part of the church that thereby the common prayer should be the worse understood by the hearers, willeth and commandeth that, first, no alterations be made of such assignments of livings as hath heretofore been appointed to the use of singing or

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music in the church, but that the same so remain; and that there be a modest and distinct song so used in all parts of the common prayers in the church, that the same may be as plainly understood as if it were without singing; and yet, nevertheless, for the comfort of such as delight in music, it may be permitted that in the beginning or in the end of common prayer, either at morning or evening, there may be sung an hymn or such like song to the praise of Almighty God, in the best melody and music that may be conveniently devised, having respect that the sentence of the hymn may be understood and perceived.

"Also in the Articles for the Administration of Prayers and Sacraments, set forth in the further injunction of the same queen in 1564, the Common Prayer is directed to be said or sung decently and distinctly in such place as the ordinary shall think meet, for the largeness and straitness of the church and choir, so that the people may be most edified. If, then, chanting was unlawful anywhere but in cathedrals and colleges, these canons are strangely worded, and are of disputable meaning. The metrical version of the Psalms was then not existing, the first publication not taking place till 1562; and it was not regularly annexed to the Book of Common Prayer till 1576, after which those Psalms soon became the great favourites of the common people. The introduction of this version made the ancient hymns disrelished; but it cannot be meant that they were entirely superseded; for under the statutes of the Reformation, and the usage explanatory of them, it is recommended that the ancient hymns should be used in the Liturgy, or, rather, that they should be preferred to any others; though certainly, to perform them by a select band with complex music, very inartificially applied, as in many of the churches of the country, is a practice not more reconcilable to good taste than to edification. But to sing with plain congregational music is a practice fully authorised, particularly with respect to the concluding part of different portions of the service."

Preserving order during divine service.

If any person shall willingly and of purpose, maliciously or contemptuously, come into any cathedral or parish church, chapel or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher, he shall, on proof thereof before a justice of the peace by two witnesses, find two sureties, to be bound by recognizance in the sum of 50*l.*, and in default of such sureties, shall be committed to prison, to remain till the next general or quarter sessions; and upon conviction of

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the said offence at such session, shall suffer the penalty of 20*l.*[z]

We have already seen, that it is the duty of the churchwardens to maintain proper order in the church during the time of public worship; but any other person there present may remove a person who is offending against proper decorum, and thereby making himself a nuisance to all who are there assembled, and this, it is said, by the same rule of law that allows a man to abate a nuisance; and the officiating minister, consequently, would be justified in taking any measures to prevent the disturbance of the congregation by any one during the time of divine service.[a] And by the canon the churchwardens are directed not to suffer any idle persons to abide either in the churchyard or church porch during the time of divine service, but to cause them to come in or depart.

CHAPTER II.

OF BAPTISM.

Early modes of baptism.

At first, it is said, baptism was administered publicly, as occasion required, by rivers; afterwards the baptistery was built at the entrance of the church, or very near it, which had a large basin in it that held the persons to be baptised, and they went down by steps into it. Afterwards, when immersion came to be disused, fonts were set up at the entrance of churches;[b] which baptisteries here spoken of are to be seen attached to many of the foreign churches in the present day, as at Florence.

The font.

There shall be a font of stone in every church and chapel where baptism is to be ministered, the same to be set in the ancient usual places, in which only font the minister shall baptise publicly;[c] but it does not seem that it should necessarily be inferred from this, that the practice of immersion had ceased at the time when fonts were directed to be set up in churches, as the older fonts are always of sufficient size for the immersion of infants.

The people are to be admonished that it is most convenient that baptism should not be administered but upon

[z] 1 Will. 3, c. 18

[a] *Glover* v. *Hind*, 1 Mod. 168; and see 2 Hagg. Con. 141, and ante, "Churchwarden."

[b] 1 Still. E. C. 146; 1 Burn's E. L. [c] Canon 81.

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On what days baptism is recommended to be administered.

Sundays and other holidays, when the most number of persons come together, as well for that the congregation of persons there present may testify the receiving of them that be newly baptised into the number of Christ's Church, as also because in the baptism of infants every man present may be put in remembrance of his own profession made to God in his baptism; nevertheless, if necessity so require, children may be baptised on any other day.[c]

At what time baptism is to be administered.

And not only the days on which baptism is to be performed, but the more particular time is enjoined, for the people with the child or children are to be ready at the font either immediately after the last lesson at morning prayer, or immediately after the last lesson at evening prayer, as the curate by his discretion shall appoint;[d] and the same direction as to the time is given for the public baptism of such as are of riper years; and the discretion of the curate mentioned in both places evidently extends only as to whether the baptism should be after the last lesson at morning or at evening prayer.

Effect of the directions of the rubric in this respect.

The above direction is positive; so that it appears that a curate who administers public baptism, whether of infants or of adults, at any other time than as above directed, is acting in defiance of the laws of the realm, and renders himself liable to be proceeded against in the ecclesiastical courts; but custom appears to have sanctioned a very frequent departure from the strict rubrical directions in this respect.

Sponsors, numbers of.

In the public baptism of infants it is further directed that for every male child to be baptised there shall be two godfathers and one godmother, and for every female one godfather and two godmothers;[e] the meaning of which appears to be, that there shall be this number at the least, but not that there should be any restriction if a larger number are desired.

Father of the child not to be godfather.

No parent shall be urged to be present, nor be admitted to answer as godfather for his own child; and no godfather or godmother shall be suffered to make any other answer or speech than by the Book of Common Prayer is prescribed in that behalf; neither shall any person be admitted godfather or godmother to any child, at christening or confirmation, before the said person so undertaking hath received the holy communion.[f]

Sponsors must have been communicants.

It would seem, therefore, to be the duty of the minister to inquire as to the latter fact, if he had any reason to doubt whether either of the proposed sponsors had been

[c] Rubric in the Baptismal Service.
[d] Ibid.
[e] Ibid.
[f] Can. 29.

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communicant; and if the answer received should not be satisfactory, he ought to reject that person, and not to proceed with the office until the prescribed number of sponsors, properly qualified by having been communicants, should be produced.

The ministers shall take care not to permit wanton names, which being pronounced do sound to lasciviousness, to be given to children baptised, especially of the female sex; and if otherwise it be done, the same shall be changed by the bishop at confirmation;[g] which name being so changed at confirmation shall, according to Lord Coke, be deemed the lawful name.[h]

Wanton names not to be given.

If given, may be changed at confirmation.

But by the form of the present liturgy, the bishop does not pronounce the name of the person to be confirmed, as used to be done in the ancient offices of confirmation, and therefore it has been said he cannot alter it;[i] but although he does not ordinarily pronounce the name, there is no rubric which forbids it; and there seems no reason why he might not do so if he should so think fit, for the purpose of complying with the constitution above mentioned, if any improper name had been given to any child at his baptism.

Quære, whether this can now be done?

Baptism by ministers of the Church of England may be either public in our churches, or it may be private in houses; it may be of infants or of adult persons; for each of which occasions a form is provided in our Book of Common Prayer. And wherever it is administered by a minister of the Church of England, it must be according to one of these forms, and agreeably to the directions of the rubric in that behalf.

Baptisms by clergymen.

Yet as the only essentials to baptism are the invocation of the Holy Trinity and the element of water, *verbum et elementum*, although the minister might be punished for additions to or omissions from the service, or for any inattentions to the forms prescribed, the baptism would be valid and effectual, provided these essentials were observed.[k] For the effect of baptism, in whatever form the ceremony may be performed, so long as certain necessary things are observed, is not so much to admit the person baptised into any particular church, as to make him one of the general congregation of Christ's flock.[l] And in this respect it is analogous to the ceremony of marriage, which, as used in other countries, or in societies differing from the Church of England, is nevertheless without doubt equally valid and effectual. The rubric provides that the curates of every parish shall often warn the people that, without great cause and necessity, they procure not their children to be

Essentials to valid baptism.

[g] Peccham, Lind. 249; 1 Burn's E. L. [h] Co. Litt. 3 a.
[i] Rogers's E. L. 69. [k] See post. [l] See the baptismal service.

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baptised at home in their houses; yet if, without any such necessity, the baptism take place, the child so baptised is lawfully and sufficiently baptised, and is not to be baptised again.[m]

Sufficiency of private baptism.

The minister in his discretion would appear to be the proper judge of the necessity here spoken of; and if he should privately baptise without any such necessity, he would be liable to be punished for so doing. Yet it seems to be a discretion not to be exercised without some danger; for if any minister, being duly and without any manner of collusion informed of the weakness and danger of death of any infant unbaptised in his parish, and thereupon desired to go or come to the place where the said infant remaineth, to baptise the same, shall either wilfully refuse so to do, or of purpose, or of gross negligence, shall so defer the time, as, when he might conveniently have resorted to the place, and have baptised the said infant, it dieth through such his default, unbaptised, the said minister shall be suspended for three months; and before his restitution shall acknowledge his fault, and promise before his ordinary that he will not willingly incur the like again. Provided, that when there is a curate or a substitute, this constitution shall not extend to the parson or vicar himself, but the curate or substitute present.[n]

When private baptism may not be refused.

Punishment for refusal.

And, as baptism would be valid and effectual if performed by a minister of our Church, however irregularly and improperly, provided the before-mentioned essentials were observed, so also would it by our laws be recognised as valid and effectual, subject to the same proviso, though not performed by a minister of our Church; nay even, as it appears, though performed by one not pretending to be a minister of any denomination, or by one who should not be a believer in the Christian faith.

Who may baptise.

In the case of *Kemp* v. *Wickes*,[o] although the question arose as to the right of burial, of which we shall come to speak more particularly hereafter, yet from the form of the pleadings, and the admissions on either side, the sole question in controversy was as to the validity of lay baptism; for there appeared to be no dispute as to the three following facts, viz. 1. That the office of burial was not to be used for persons who should die unbaptised. 2. That the child brought to be buried had been only baptised according to the form used by Wesleyan dissenters. 3. That the refusal of Mr. Wickes was founded upon the point of law that he was not bound to bury persons who had been so baptised. The effect of these three admissions taken together left the

Validity of lay baptism.

Established by case of *Kemp* v. *Wickes*.

[m] Rubric in the baptismal service. [n] Canon 69. [o] 3 Phill. 266.

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sole question to be determined, whether the baptism admitted to have been performed was of a valid and effectual nature. And, as it was said by Sir J. Nicholl, if the child died unbaptised, the minister was not only justified, but it was his duty, and he was enjoined by law not to perform the service. If the child did not die unbaptised, then he has violated the canon by a refusal neither justified by any exception contained within the canon itself, nor by any subsequent law. In his able and conclusive judgment on this case, Sir J. Nicholl showed, by numerous quotations from the canons and constitutions of the Church, that the Church had always been especially careful that baptism, by whomsoever performed, *sive per laicum, sive per clericum, etiam per paganum in casu necessitatis*, was not to be repeated; that two things only were deemed essentially necessary—1. That the person should be baptised in the name of the Father, Son, and Holy Ghost; 2. That the element of water should be used; and if those two essentials were complied with, the baptism, however irregular, was yet always considered valid, so that it was not afterwards to be repeated. That it was the use of the water, and the invocation of the Holy Trinity, that was essential to the baptism. Those, as Lyndwood had explained, were the *duo necessaria*. After these quotations, Sir J. Nicholl proceeds as follows:

Duo necessaria.

"Now these passages show not only that those baptisms were held to be valid, but they show how extremely cautious the Church was that baptism should not be repeated. These references to the ancient law will also serve to explain and illustrate any matter which could be considered as doubtful in the construction of the more modern law of the rubric. It therefore seems to admit of no doubt, that by the law of the English Church, as well deduced from the general canon law, as from its own particular constitutions, down to the time of the Reformation, lay baptism was allowed and practised.

"It was regular, and even prescribed in case of necessity. It was so complete and valid that it was by no means to be repeated. It also clearly appears that in order to ascertain its validity no inquiry was necessary to be made into the existing urgency under which it was administered, but only into what was declared to be the essence, whether it had been administered by water, and in the form of the invocation, for if those forms were used, the baptism by a layman was complete and valid.

"So the matter stood at the time of the Reformation, and that period is an important one, for if lay baptism

Period of the Reformation.

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had been considered as one of the errors of the Romish Church, it would have been corrected at the time when all the Christian world had their attention pointed to those particular errors. But the fact is otherwise, for the use of lay baptism was manifestly continued by the English Reformed Church. Liturgies were framed, and acts of uniformity passed by parliament in the reigns of Edward VI. and of Queen Elizabeth. In those the rubrics run thus: Let those that be present call upon God for his grace, and say the Lord's Prayer, if the time will suffer; and then one of them shall name the child, and dip him in the water, or pour the water upon him, saying these words: 'I baptise thee in the name of the Father, and of the Son, and of the Holy Ghost.' Here is no mention whatever of a priest or lawful minister as the person who is to officiate upon the occasion; it is directed to be done by those who are present, or one of them, without singling out or particularizing what the person is to be who is to administer the sacrament. And the better opinion seems to be that all private baptism was by laymen antecedent to the time of King James; that it was only public baptism in the church which was to be administered by a priest; and that wherever there was the sort of urgency and necessity which prevented the child being brought to the church, and required the child to be baptised at home, the baptism was to be administered by any person, without requiring the attendance of the priest. The same rubric, although it enjoins the people not to baptise their children at home, except in cases of necessity, yet, lest the necessity should arise, expressly directs the pastors to instruct their parishioners in the form of doing it. Hence, it is evident that subsequent to the Reformation, the English Reformed Church itself did allow the practice of lay baptism.

All private baptism formerly by laymen.

Lay baptism evidently allowed by the Church subsequently to the Reformation.

Articles in the year 1575.

"So the practice stood from the Reformation till the time of King James I., except that in the year 1575, among some articles agreed upon at that time in convocation, there appears to have been one (the 12th article), which states, that to resolve doubt by whom private baptism is to be administered, it is directed that in future it shall be administered by a minister only, and that private persons shall not intermeddle therein. This article rather appears not to have been published and circulated. It remained in manuscript. It had no authority, not appearing to have been even confirmed by the crown. There could have been no doubt upon the rubric of Edward VI., coupled with what was the old law so far as respected the validity of lay baptism.

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"And the bishops certainly had not authority to alter the law, they had only authority to explain matters which were doubtful; and the doubt seems to have been, not whether lay baptism was valid, but whether it was regular and orderly. Up to that time, wherever private baptism was allowed, there was nothing to be found in the ancient canons, the constitutions of the Church, or the rubric, that required the minister, as a person at all necessary to be present for the orderly administration of such private baptism, it was not even to be inferred that it would be more regular; for the minister is not mentioned, on the contrary, in cases where private baptism was necessary (and it was only allowed in cases of necessity), the people were to be instructed how to perform it themselves. The most to be deduced from this article, therefore, is, that it was thought at that time by the convocation that it would be more proper, regular and decent, to have the ceremony of private baptism performed by ministers; and therefore it was directed to be performed by them, and laics were restrained from doing it; but the article, as before stated, does not appear to have been published.

"King James I. (who considered himself a great divine) disapproved of the practice of lay baptism. Soon after his accession conferences were held at Hampton Court with the clergy, for the purpose of revising and reconsidering the Liturgy, and particularly this article of private baptism. The king expressed strongly his disapprobation of lay baptism, and seemed more inclined to no baptism at all, than that the office should be performed by a laic; but his divines (most of them prelates of very great eminence) differed from him in respect to preferring the total omission of baptism to its being administered by a layman. It was, however, agreed so far to alter the rubric as to direct that private baptism should be administered by a lawful minister; but whoever reads the account which has been preserved of these conferences, will see that neither the king nor the bishops maintained that baptism, if *de facto* performed by a laic, was invalid; on the contrary, even King James expressly declared his opinion to be that if baptism had been performed by a laic, with water and the invocation of the Trinity (which he also admitted to be the essence of the sacrament itself), such baptism was not to be iterated; that is, that the person was not to be rebaptised; for the king's words, as recorded, are—'I utterly dislike all rebaptisation on those whom women or laics have baptised.' He himself, therefore, considered lay baptism as valid, though he thought fit to enjoin the ad-

Hampton Court conferences.

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ministration even of private baptism to be by a clergyman, as much more orderly and proper.

Proclamation by James I.

"The rubric at that time agreed on was never confirmed by parliament; but a proclamation afterwards appeared for the authorising an uniformity in the Book of Common Prayer; and his majesty says in that proclamation, 'We have thought meet that some small matters might rather be explained than changed.' The proclamation has no suggestion whatever of so important a change in the English Church, in the established constitution of that Church, as it had existed, not only in early times, but as it existed after the Reformation had taken place, as that baptism actually administered, even by a laic, in the due form, with the element and the words, should be considered as wholly null and invalid, and that such a baptism could bear rebaptisation. There is nothing of the kind in the proclamation; on the contrary, explanations in some small things, rather than a change, are alone referred to.

"In construing all laws, it is proper to inquire how the law previously stood; for it will require more express and distinct terms to abrogate and change an old established law, than to provide for a new case upon which the former law has been wholly silent. Private baptism by laymen had always been held valid, and almost enjoined as regular. The rubric having now introduced the order that it shall be administered by the lawful minister, what would be the obvious construction of this alteration? That in the regular and ordinary and decent administration of private baptism, it became the duty of the lawful minister to perform the office. But if the old law was meant to be completely changed, if it had been intended to invalidate the old law in this respect, and that all other baptisms, except that by a lawful minister, should be considered as absolutely null and void, the new law would most expressly and distinctly have declared it.

Analogy to the law affecting marriages.

"Upon this rule of construction, the case of marriage has been referred to as strongly analogous. Marriages are by the rubric enjoined to be solemnized by a minister; there is to be a previous publication of banns, and other ceremonies are to be observed; the laws of the Church and the State by several acts of parliament prohibited marriage to be performed in any other way; it punished the parties concerned in clandestine marriages, both the minister who solemnized them, and the parties between whom they were solemnized. But notwithstanding all these laws enjoined how a marriage was to be solemnized, and punished those who solemnized it in any other way, what was the conse-

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quence; did the marriage become void? By no means. A marriage in a private house between minors, was a perfectly valid marriage (notwithstanding it was irregular, and so far an unlawful marriage), till the Marriage Act, by direct and positive terms, expressly declared that such a marriage should be null and void to all intents and purposes. So baptism in a house to be regular after this rubric could only be administered upon occasions of urgency, and by a minister of the Church; but if it was performed by a layman, and without necessity (though it was an irregular baptism, though the parties might be punished for violating the injunctions of the rubric), still it was not an invalid baptism, and the party could not be rebaptised.

Conclusion drawn from the rubric published by James I.

"The rubric itself, as published by King James, leads to the very same conclusion. Certain questions are directed to be asked for the purpose of ascertaining whether the child has been already baptised, and the question ran in this order and form:—"If the child were baptised by any other lawful minister, then the minister of the parish where the child was born or christened shall examine and try whether the child be lawfully baptised or no. In which case, if those that bring any child to the church do answer that the same child is already baptised, then shall the minister examine them further, saying, 'By whom was this child baptised? Who was present when this child was baptised? Because some things essential to this sacrament may happen to be omitted through fear or haste in such times of extremity, therefore I demand further of you, With what matter was this child baptised? With what words was this child baptised?' And if the minister shall find by the answers of such as bring the child, that all things were done as they ought to be, then shall not he christen the child again, but shall receive him as one of the flock of true Christian people.

Inquiries made at the time of baptism explained.

"Now it by no means follows from asking by whom was this child baptised, or who was present when this child was baptised, that the person who administers the ceremony is essential to the validity of the baptism, or that those inquiries are made for the purpose of ascertaining whether the baptism be valid or not; for it is obvious that it is not essential who were the persons present. Why, then, is it to be inferred as essential who was the person by whom the ceremony was performed? On the other hand, it may be extremely proper and convenient to inquire into both those circumstances, for the purpose of enabling the minister more satisfactorily to ascertain whether the essentials themselves have been performed; for

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if the office has been performed by a lawful minister, then there is less suspicion of irregularity or defect in the performance, and a less minute inquiry may satisfy the minister that the baptism has been properly administered. Again, if the persons present at the baptism were respectable intelligent persons, or persons who are at the time attending, and who, therefore, can be further questioned by the minister in respect to the essentials of baptism, it may be material and proper, for that reason, to inquire who were the persons that were present. Hence it appears that these questions being introduced, does not establish that a minister was essential to the administration of the rite; but more especially when we find this preamble to the third and fourth questions interposed in the middle of the queries; because *some things essential* to this sacrament (for so I think is the natural mode of reading it, and not in the way in which the emphasis was laid by the counsel)—because some things essential to this sacrament may happen to be omitted (for if any thing essential was omitted, it might be proper to consider the baptism as null); therefore I demand of you 'With what matter was this child baptised? With what words was this child baptised?'

"If any doubt could be made upon what is meant by the rubric in this respect, it would be cleared up most satisfactorily by adverting to the old law upon the subject; and by the old law (as has been already stated) it was the use of the water and the invocation of the Holy Trinity, that was essential to the baptism; those, as Lyndwood has explained, were the *duo necessaria*. Again, 'if every thing has been done as it ought to be,' what is meant by the phrase 'done as it ought to be,' is explained by adverting to the commentary of Lyndwood, for he has stated, in his Gloss, the terms *ritè ministratus*, *legitimè factum*, and *forma debita*, to mean the use of water and the form of words: this can, therefore, leave no doubt what was the meaning of the rubric, thus illustrated as it is by reference to the ancient law and to Lyndwood.

"But the concluding part of the rubric is equally decisive upon the subject; for it is—'If they which bring the infant to the church, do make such uncertain answers to the priest's question, as that it cannot appear that the child was baptised with water in the name of the Father, and of the Son and of the Holy Ghost (which are essential parts of baptism), then let the priest baptise it in the form before appointed for public baptism of infants, saving that at the dipping of the child in the font, he shall use this

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form of words:—'If thou art not already baptised, I baptise thee in the name of the Father and of the Son and of the Holy Ghost.' If there were a doubt then whether the child was baptised with water and with the invocation (which are here expressly declared to be essential parts of baptism), then the child was to be conditionally and hypothetically rebaptised, the Church being so extremely anxious to avoid iteration. But supposing a doubt arose whether the former baptism had been administered by a lawful minister, was the child, in that case, to be rebaptised, even hypothetically? Such a doubt might very easily happen; the persons present might not be able to answer who the person was that had baptised, or they might not be able to answer whether the person who administered the baptism was or was not a lawful minister. He might have been an entire stranger to them; and yet, if that fact appears doubtful, here are no directions in the rubric for a conditional rebaptisation.

Arguments drawn from the form used in baptism.

"Hence it is obvious, that the person performing the baptism was not essential by the rubric, and in this respect the rubric exactly conformed to the old law; for the baptism remained valid, and was not to be repeated; and even to what King James said at the conference, just before this rubric was approved, that he utterly disliked all rebaptisation.

"After the Restoration the rubric was revised, and was confirmed by parliament, and no alteration was made except in the title of the office—for, unless I have been misled by a book of some authority (not having seen the Prayer Book of the time of King James), the title of King James's office for the administration of private baptism was this:—'Of them that be baptised in private houses in time of necessity by the minister of the parish, or other lawful minister that can be procured.' Now the title of the office stands thus:—'Of the Ministration of Private Baptism of Children in Houses;' there is an omission, therefore, in the title of the words lawful ministers, or anything referring to them. This alteration in the title, if it meant any thing as applied to the present question, seems pretty strongly to infer that the title was considered as in too precise a manner requiring both the existence of the necessity and the intervention of a lawful minister; and the title of the office was therefore left in more general terms 'Of the Administration of Private Baptism in Houses' simply; and it was only in the directory part, as in marriages, that it was set forth, let the lawful minister say so and so; inferring that lawful ministers were the

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persons regularly to perform the office, and that it was considered a part of their duty.

General opinion of the Church.

"So the matter still remains: and after tracing the law through the several stages of its history, it appears impossible to entertain a reasonable doubt that the Church did at all times (whatever might have been the opinions of particular individuals upon this point, as there will be difference of opinions among individuals on all points)—that the Church itself did at all times hold baptism by water, in the name of the Father, and of the Son, and of the Holy Ghost, to be valid baptism, though not administered by a priest who had been episcopally ordained, or rather, to state it more generally, though administered by a layman or any other person. If that be so—if that is the construction of baptism by the Church of England, then the refusal of burial to a person unbaptised, that term simply being used, cannot mean that it should be refused to the persons who have not been baptised by a lawful minister in the form of the Book of Common Prayer; since the Church itself holds persons not to be unbaptised (because it holds them to be validly baptised) who have been baptised with water and the invocation by any other person and in any other form."

In cases of protestant dissenters.

It does not appear here to be useful to advert to that latter part of this careful judgment, which refers more particularly to protestant dissenters and to the toleration acts; for if baptism, by whomsoever performed, *sive per laicum, sive per clericum, etiam per paganum, in casu necessitatis*, is valid, that performed by dissenting ministers cannot certainly be less so. The following sentence however is important: "By the toleration act an important change was worked in the situation of dissenters, and baptisms now by dissenting ministers stand on very different grounds from those by mere laymen; protestant dissenters being now allowed the exercise of their religion, being no longer liable to pains and penalties, their ministers lawfully exercising their functions, the rights of that body being allowed by law, it can no longer be considered that any acts and rites performed by them are such as the law cannot, in the due administration of it, take any notice whatever of, or that baptism performed by them, when attended with what our own Church admits to be the essentials of baptism, is still to be looked on as a mere nullity.

The first part of this judgment has been here inserted at considerable length, on account of the full history of this subject which it supplies, and from the clear and conclusive reasoning contained in it. "Why," says Sir J. Nicholl

Opinion of Sir J. Nicholl.

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in conclusion, "the rights and interests of the Church are to be affected by considering dissenting baptisms as Christian baptisms—by allowing persons so baptised the common right of being buried according to the ordinary forms of the Church and by a minister of the Church, to whose support they are bound to contribute, has not been explained. If the law has not excluded them from this ordinary right of Christianity and humanity, the ministers of the Church will not surely be degraded by performing the office. On the contrary, the generality of the clergy, it may be presumed, will rejoice that in this last office of Christian charity there is no separation between the Church and their protestant dissenting brethren. It is by a lenient, a liberal interpretation of the laws of disability and exclusion, and not by a captious and vexatious construction and application of them, that the true interests and the true dignity of the church establishment are best supported."

The above able judgment of Sir J. Nicholl, although it was but a single decision, and not carried up upon appeal, appears for a long time to have set this question at rest. It was very generally acquiesced in, and no case was brought before the courts calling it in question, or impugning the principles on which it was based for thirty years.[p] It might have been supposed, therefore, that the point was finally settled; especially since it had been settled in a manner so consonant to the proper feelings both of churchmen and dissenters, and which neither party could have any interest in disturbing. But the question was nevertheless at last again raised in precisely the same manner, viz., by the refusal of a clergyman to bury the body of a child brought to him to be buried, on the ground that it was unbaptised, never having been baptised by a regularly ordained minister of the Church of England.[q]

This decision was for a long time acquiesced in.

The facts in this case were as little in dispute as in the preceding, for it was admitted that the outward form of baptism had been complied with; it was also admitted in effect that lay baptism was tolerated in the Church down to 1603. But it was pleaded by the defendant, that after the conference at Hampton Court at that time, an alteration was made in the liturgy; and that from that time lay baptism, which had been allowed by the Church of Rome, was no longer allowed in our Church, and that the practice was repudiated by the ecclesiastical authorities of this realm at that time assembled. The question there-

Case of *Mastin* v. *Escott*, on lay baptism.

[p] Sir H. Jenner, in *Mastin* v. *Escott*, post.
[q] *Mastin* v. *Escott*, 2 Curt. 692.

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fore raised in this case was solely, "whether since the alteration in the rubric an episcopally ordained minister was essential to the valid administration of this rite." It is consequently only necessary to allude to that part of the judgment in this case which relates to what took place about the year 1603, and to what has taken place subsequently. The state of the old law upon the subject being admitted, nothing was done, says Sir H. Jenner, to alter the law until 1575: then, at a convocation of the province of Canterbury (it does not appear that the province of York had any concern with it), fifteen canons were made and agreed upon, and amongst them was one which went directly to prohibit the administration of private baptism by any but a lawful minister, or a deacon called to be present for that purpose. Of these the queen refused her assent to the 15th. Thirteen only of them were printed. This canon prohibiting lay baptism was not published with the rest. Gibson says, "This canon was not published in the printed copy; but whether on the same account that the 15th was left out, that is, because disapproved by the crown, I cannot certainly tell." It does appear to have been mentioned at the Hampton Court conference, and on the whole, if it was published, it never appears to have been considered to have any binding authority, for in 1594 a proclamation of Queen Elizabeth was published continuing the very same rubric and the same directions for the performance of private baptism as were in Edward VIth's Prayer Books. I think the result of this conference at Hampton Court is not that which is alleged by the defendant, Mr. Escot, in his allegation, namely, that from that period to the present day, that is, from 1603, the liturgy of the Church of England has not allowed the rite of baptism performed by unordained persons to be valid, but has held the direct contrary. It appears to me, that though the persons engaged in that conference did all they could to discourage the administration of baptism by laymen and by women; yet that they could not prevail upon themselves absolutely and expressly to prohibit, still less to declare, such baptism absolutely null and void.

Question whether the old law had been altered since 1603.

Canons agreed upon in 1575.

The canon prohibiting lay baptism not published.

And never considered to have any authority.

Result of the Hampton Court conference.

The liturgy and the rubric were afterwards altered according to the decision of the king and of the bishops at that time; and the king in the proclamation issued shortly afterward, reciting what had taken place at Hampton Court, states that he thought some small things might rather be explained than changed. This certainly is not the language which would have been used if so great an

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alteration as that which is contended for had been contemplated in the ritual of the Church, as the mode of administering baptism in private houses. Under these circumstances the court is warranted in saying that up to this time the Church had not pronounced lay baptism to be invalid.

Sir H. Jenner, after some further remarks, particularly referred to the opinion of the bishops so late as 1712, and quoted from the published papers of Archbishop Sharpe the following words: "Tuesday, 22nd April, I went to Lambeth, we were in all thirteen bishops; we had a long discourse about lay baptism, which of late hath made such a noise about the town; we all agreed that baptism by any other person except lawful ministers ought to be discouraged; nevertheless, whoever was baptised by any other person, and in that baptism the essentials of baptism were observed, that is being dipped or sprinkled in the name of the Father, &c., such baptism was valid, and ought not to be repeated."[q] The learned judge observed in conclusion, "It seems to me upon the whole of the case, that the law of the Church is beyond all doubt, that a child baptised by a layman is validly baptised." And this opinion was confirmed, and the question it is presumed finally settled, upon appeal to the queen in council.[r]

Opinion of Archbishop Sharpe and other bishops in 1712.

Undoubted and finally settled law of the Church.

Among the privileges conferred by baptism, it seems at one time to have been doubted whether the important one of freedom was not to be included;[s] and the consequence of this appears to have been, that baptism was withheld from negro slaves, lest they should by receiving it become free. Upon this Blackstone remarks,[t] after mentioning how the law of England abhors the existence of slavery, "Within this nation the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles; it gives liberty rightly understood, that is, protection to a Jew, a Turk, or

Freedom supposed to be conferred on slaves by baptism.

Remarks of Blackstone on this.

[q] Since the final settlement of this question by the decision of the highest court of appeal in matters ecclesiastical, several attempts have been made to disturb it, and several minor propositions, which are obviously included in the settlement of the major, have been denied. Thus, after it had been decided that lay baptism generally was valid, objections were attempted to be raised to baptisms by Wesleyan ministers and ministers of other sects, as being what were called heretical baptisms. And it was also gravely objected that the validity of such lay baptisms became effete as the child grew up, and ceased as it became adult. But it would only create unnecessary confusion to notice cases or opinions which can have no effect upon the settled law.

[r] *Escott* v. *Mastin*, Moore, P. C. Cases.

[s] 3 Mod. 120.

[t] 1 Black. Com. 425.

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a heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties; but the slave is entitled to the same protection in England before as after baptism; and whatever service the heathen negro owed of right to his American master by general, not by local law, the same, whatever it be, is he bound to render when brought to England, and made a Christian."

The above is inserted rather as matter of history than of law, and to show the ideas that have existed formerly in reference to this subject; for happily at the present day the consideration of such matters has become unnecessary and obsolete.

Fees for baptism.

As to the right of the minister to receive any fee for baptism, it seems that it may exist in some particular places by prescription; for they who have paid so long are presumed to have at first bound themselves voluntarily thereunto;[u] but no such right can exist generally; and it is directly opposed to the following constitution:— "We do firmly enjoin that no sacrament of the church shall be denied to any one upon the account of any sum of money, because if anything hath been accustomed to be given by pious devotion of the faithful, we will that justice be done thereupon to the churches by the ordinary of the place afterwards."[x] And even in those places in which fees have been used to be paid, it is not easy to see in what manner the payment of them could be enforced; and it is certain that baptism could not be withheld, if they were refused; for the injunctions of the 68th and 69th canons above mentioned are positive that there shall be no refusal or delay by ministers in christening, if the circumstances there mentioned are complied with; and the payment of fees for performing the service does not appear there to be contemplated.[y]

No right of minister to such fees generally.

Baptism could not be refused or delayed for non-payment of a fee.

Wherever in any particular parish any prescriptive right to a fee for baptism may have been established, this can only extend to such baptisms as are actually performed by the minister of that parish; and if any parishioner should take his child elsewhere to be baptised, the minister of his parish could have no right to demand of him the fee. Thus Burdeaux, a French Protestant, had his child baptised at the French Church in the Savoy, and Dr. Lancaster, vicar of St. Martin's, in which parish it is, together with the clerk, libelled against him for a fee of 2*s.* 6*d.* due to him,

Minister not performing the service cannot claim fee by prescription in the parish, if the child is baptised out of it.

[u] Lindw. 279.
[x] Lindw. 278; 1 Burn's E. L. 116.
[y] See ante.

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and 1*s.* for the clerk; a prohibition was moved for, and it was urged that this was an ecclesiastical fee due by the canon. Lord C. J. Holt said, "Nothing can be due of common right, and how can a canon take money out of laymen's pockets? Lindwood says it is simony to take anything for christening or for burying, unless it be a fee due by custom; but then a custom for any person to take a fee for christening a child when he doth not christen him, is not good; like the case in Hobart, where one dies in one parish, and is buried in another, the parish where he dies shall not have a burying fee; if you have a right to christen, you should libel for that right; but you ought not to have money for christening when you do not do it."[z] And notwithstanding the opinions which may have heretofore prevailed to the contrary, it appears to be at least very doubtful whether in any case the payment of a fee for baptism could be enforced. In the table of fees signed by Lord Stowell for the parish of St. Andrew's, Holborn, and to which we shall afterwards allude,[a] there is no mention of a fee for baptism, although there is one specified for registering baptisms; and wherever a fee for baptism has been customarily paid, it is probable that it originated in the fee for registration; and the fact that the payment might be thus explained would seem to render it almost impossible to prove a custom, or to establish a prescriptive claim to it.

Query, whether any right to fee for baptisms in any case.

When the minister has baptised the child, he has a further duty to perform in making an entry thereof in the parish register, which is a book in which formerly all christenings, marriages, and burials were recorded, and the use of which is enforced both by the canon law and by statute.

Registering baptisms.

The parish register is said to owe its origin to the Lord Vicegerent Cromwell; and the canon is said to be only a reinforcement of one of his injunctions in the year 1538, and which were continued during the two succeeding protestant reigns.

Origin of.

It appears unnecessary to mention the somewhat minute directions of the canon in this respect; since the keeping of parochial registries of baptism and also of burial[b] are, so far as regards the duties of clergymen in that respect, regulated by the statute 52 Geo. III. c. 146, whereby it is enacted, that registers of public and private baptisms, marriages,[c] and burials solemnized according to

Registries of baptism by the statute 52 Geo. 3, c. 146.

[z] 12 Mod. 171; 1 Salk. 332.

[a] See post, Burial.

[b] Several of the provisions relating to registering burials have been mentioned in this place for the sake of avoiding repetition.

[c] As to marriages repealed by 6 & 7 Will. 4, c. 86, see post, "Marriages."

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the rites of our church, shall be made and kept by the rector, or other the officiating minister, of every parish or chapelry, on books of parchment or durable paper, to be provided by the king's printer at the expense of the parishes; and the particular form of the book and of the manner of making the entries are directed according to a form in the schedule to the act.[d]

Books for registering baptisms.

Separate books, with the forms appropriate to each, are to be provided for baptisms (whether public or private) and for burials; and every officiating minister, as soon as possible after the solemnisation of every baptism, whether public or private, and after every burial, shall record in the proper register-book for that purpose the several particulars pointed out to be inserted by the form of the book, and shall sign the same; and unless he is prevented by sickness or unavoidable impediment, this is in no case to be delayed later than seven days after the ceremony has taken place.[e]

Baptisms and burials performed elsewhere than in parish church, or by any other than the minister of the parish.

If the ceremony of baptism or burial is performed elsewhere than in the parish church or chapel, having its own registry, and by a person who is not the officiating minister of the parish, then the minister performing the ceremony must, on the same or the next day, transmit to the minister of the parish a certificate in a prescribed form;[f] and the minister of the parish is thereupon to enter such baptism in the register according to the certificate, adding the words according to the certificate of the Rev. A. B., transmitted to me on the —— day of ——.[g] This last-mentioned section is important to be observed in the case of private baptisms.

In case of private baptisms.

Register-book. Where to be kept, and when produced.

The register-book is to be deemed the property of the parish (so that in legal proceedings it would be properly termed the property of the churchwardens); the custody of it is to be in the rector or other officiating minister, by whom it is to be kept in an iron chest, provided by the parish, either in his own house, if he resides in the parish, or in the church; and the book is to be taken from the chest only for the purpose of making entries, being produced when necessary in evidence, or for some of the purposes mentioned in the act.[h]

Copies how to be made and verified.

At the expiration of two months after every year, copies of the entries in the preceding year are to be made by the officiating minister or persons under his direction, on parchment, to be provided by the parish, and the contents

[d] See Appendix. [e] Sect. 3. [f] See Appendix.
[g] Sect. 4. [h] Sect. 5.

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to be verified by the minister according to a prescribed form;[i] and the declaration in such form is to be written on the copy, without any stamp, immediately after the last entry, and the signature to be attested by one at least of the church or chapel wardens.[k]

To whom to be sent.

And these copies, thus verified and attested, are to be transmitted by post to the registrar of the diocese, on or before the 1st of June in every year; and the registrar of every diocese, on or before the 1st of July, is to report to the bishop whether such copies have been sent to him, and if not, specially to state the default.[l]

Minister neglecting to sign and verify.

If the minister neglect to verify or sign such copies and such declaration, so that the churchwardens are not able to transmit them, they shall, within the time required for the transmission thereof, certify such default to the registrar, who shall specially state the same in his report to the bishop.[m]

Baptisms in extra-parochial places.

In the cases of baptisms or burials in extra-parochial places, where there is no church or chapel, the officiating minister, within one month afterwards, is to deliver to the rector, &c., of the parish immediately adjoining, as the ordinary shall direct, a memorandum thereof, signed by the parent of the child baptised; or a memorandum of the burial, signed by the persons employed about the same, together with two of the persons attending the same, as the nature of the case may require; every such memorandum to contain such particulars as are by the act required; and such memorandum shall be entered by the rector, &c., to whom it is so given, in the register of his parish, and form a part thereof.[n]

Punishment for wilfully altering register, &c.

Any persons wilfully inserting or causing to be inserted false entries in the register or the transmitted copies, or forging, altering, or counterfeiting the same, or wilfully destroying, defacing, or injuring the register-book, or knowingly signing or certifying any copy, false altogether or in part, shall be guilty of felony, and transported for fourteen years.[o]

Mode of correcting errors discovered in the register book.

But no rector or officiating minister who shall discover any error to have been committed in the form or substance of the entry of any such baptism or burial by him solemnized shall be liable to those penalties, if he shall within one calendar month after discovery of such error, in presence of the parent or parents of the child baptised, or in case of the death or absence of the respective parties, then in the presence of the church or chapel wardens (who shall attest the same), alter and correct the entry found to be erroneous, according to the case, by entry in the margin

[i] See Appendix. [k] Sect. 6. [l] Sect. 8.
[m] Sect. 9. [n] Sect. 10. [o] Sect. 14.

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of such book wherein such erroneous entry is made, without alteration of the original entry; and he shall sign such entry in the margin, and add to such signature the day of the month and year when such correction was made; provided that, in the fair copy of the register so transmitted to the registrars of the dioceses, the officiating minister shall certify the alterations so made by him.[p]

The statute which we have thus far analysed contains several further directions as to registration, but it will not be necessary to mention them here, as they do not in any way affect our present subject, viz. the duties of a minister in the office of baptism.

Effect of stat. 6 & 7 Will. 4, c. 86.

The recent act[q] passed for the civil registration of births, deaths, and marriages, expressly provides that nothing therein contained shall affect the registration of baptisms or burials as now by law established; so that, whatever any parishioner, incumbent, or curate, had respectively a right to insist upon with regard to the registration of baptisms, may be equally insisted on by either party now.[r] All the directions therefore contained in the statute before explained remain in full force.

Additional directions.

The following enactments, however, of the statute 6 & 7 Will. IV. c. 86, are to be observed in addition to those before mentioned.

If any child born in England, whose birth shall have been registered according to the provisions of that act, shall, within six calendar months after it has been so registered, have any name given to it in baptism, the parents or persons so procuring such name to be given, may within seven days afterwards procure and deliver to the registrar a certificate according to a prescribed form,[s] signed by the minister who shall have performed the rite of baptism; which certificate the minister is required to deliver immediately after the baptism, whenever it shall be then demanded, on payment of the fee of 1*s.*, which he shall be entitled to receive for the same; and the registrar or superintendent registrar, upon the receipt of that certificate, and upon payment of a fee of 1*s.*, shall, without any erasure of the original entry, forthwith register that the child was baptised by such a name; and such registrar or superintendent registrar shall thereupon certify upon the certificate the additional entry so made, and forthwith send the certificate through the post to the registrar general.[t] Every rector, &c., and every registrar, &c., who shall have the keeping for the time being of any register-book, shall at all reasonable times

Minister performing rite of baptism to give certificate, if required.

Fee for certificate, &c.

[p] Sect. 15. [q] 6 & 7 Will. 4, c. 86. [r] Rogers's E. L. 771, 772.
[s] See Appendix. [t] 6 & 7 Will. 4, c. 86, s. 24.

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allow searches to be made, and shall give a copy, certified under his hand, of any entry or entries in the same, upon payment of a fee of 1*s.* for every search, extending over a period of not more than one year, and 6*d.* additional for every half year, and 2*s.* 6*d.* for every single certificate.[u] Searching the register book. Fee for.

All persons wilfully making or causing to be made any false statements as to any of the particulars required to be inserted, are to be deemed guilty of perjury.[x] Persons wilfully making false statements.

Any person having the custody of any register-book, or certified copy thereof, or of any part thereof, who shall carelessly lose or injure the same, or carelessly allow the same to be injured while in his keeping, shall forfeit a sum not exceeding 50*l.*[y] Losing or damaging register, &c.

CHAPTER III.

OF MARRIAGE, AND THE DUTIES OF A MINISTER IN RELATION THERETO.

Of all the various matters which are the subject of the laws of this country, none perhaps is more important than that of marriage: and this, whether we consider it as the subject of the ecclesiastical or of the common law. In what manner marriage may be contracted so as to be valid and indissoluble, is in itself an extensive consideration; but the various consequences of that contract, upon property settled by or upon the contracting parties, the reciprocal rights and duties of husband and wife, the rights of children of the marriage, and the duties and liabilities of trustees, all these form varied and extensive subjects of inquiry. Importance and extent of the laws of marriage.

It will be obvious, however, that for our present purpose the discussion of these matters would be unnecessary, and we shall endeavour, in the present chapter, to confine ourselves to the consideration of that branch of the law which treats of the ceremony of marriage and its immediate incidents; and to those only, so far as the clergyman is interested in, or affected by, its provisions. Formerly, marriages celebrated per presbyterum sacris ordinibus constitutum were alone valid and complete as marriages in this country, and those only were regular which were also Subject of the present inquiry.

[u] Sect. 35. [x] Sect. 41. [y] Sect. 42.

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celebrated in facie ecclesiæ.[a] But before the time of Pope Innocent III. there was no solemnization of marriage in the church; but the man came to the woman's house where the woman inhabited, and led her home to his own house, which was all the ceremony then used.[b] By the customs of the Anglo-Saxons the marriage ceremony was commonly performed at the house of the bridegroom, to which the bride had been previously taken;[c] and there was an interval in this country during which marriages were not had in facie ecclesiæ; for, during the usurpation, they were solemnized before justices of the peace, an innovation probably introduced for the purpose of degrading the clergy,[d] but it was afterwards considered necessary to pass an act of parliament to confirm the validity of such marriages. But although the clergyman might have been punishable, it does not appear that it was, previous to the first Marriage Act,[e] absolutely necessary to the validity of a marriage that it should take place in facie ecclesiæ, for many marriages solemnized in the Fleet Prison or its liberties, or in May Fair, were, before that time, considered valid though irregular marriages.[f] As no marriage, therefore, could formerly have taken place without the intervention of a clergyman, the subject was of more universal interest to him than at present; for the laws of a neighbouring country in this matter have recently been introduced here; and the intervention of a clergyman in marriage is now at the option of the contracting parties, and is by no means requisite by law to complete the validity of the contract.[g]

Marriages, how solemnized at different periods.

Recent alteration of the law.

Marriage, therefore, is no longer necessarily the subject of ecclesiastical cognizance: nor does it necessarily in any manner concern the ecclesiastical body, or its individual members; but whenever the parties may choose to contract marriage according to the forms of the church of England, the clergyman is still bound to solemnize it according to prescribed forms, and to observe all the laws relating to it in the same manner as if no such general license to marry without his intervention by law existed.[h]

Marriages according to the rites of the established church.

In order to constitute a valid marriage the parties must be able to contract, willing to contract, and must actually contract[i] in the proper forms and solemnities, required by law to be observed in the mode in which they have chosen to adopt. In each of these requisites, where the parties

Essentials to validity of marriage.

[a] Bacon's Abr. Marriage C.; Salk. 119.
[b] Moor, 170; per Goldingham, *arguendo*.
[c] Rogers, E. L. Marriage, and cases there cited.
[d] Bacon's Abr. Marriage C., note.
[e] 26 Geo. 2, c. 33. [f] 1 Lee, 28; Vin. Abr. Baron and Feme.
[g] See 6 & 7 Will. IV. c. 85. [h] Ibid. sect. 1. [i] 1 Black. Com. 433.

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intend to contract marriage according to the forms of the church of England, the clergyman is directly or indirectly concerned; for if he should knowingly perform the ceremony between those who are unable or unwilling to contract, he would be equally liable to punishment as if he performed it without observing the proper forms and ceremonies prescribed.

Parties must be able to contract.

First, then, they must be able to contract, which generally all persons may do except in the following cases:

First disability. Former wife or husband living.

If either of the parties has another husband or wife living, although such wife or husband has been beyond seas, or under sentence of transportation for life, or the like, besides the penalties consequent upon such a marriage as a felony, the second marriage is, to all intents and purposes, absolutely void, or rather a ceremony has been performed, which is no marriage but a mere nullity;[k] and the clergyman who performed such ceremony, having notice of the prior marriage, would be liable to punishment; and if he had notice of anything which might fairly raise his suspicions as to whether there had been a prior marriage, he would be bound to make all reasonable inquiry before performing the ceremony.

In what cases there has been a former marriage. Foreign marriages.

A prior marriage is valid, and must be taken notice of as such in this country, though it has been contracted in Scotland, or beyond seas, and in a foreign state, supposing it to be valid according to the law of the country where it has been contracted; and if its validity is questioned, it must be determined by the law of the country where it was contracted.[l]

The ecclesiastical courts of this country entertain questions of foreign marriages, not only of British subjects, but also (to prevent a failure of justice) examine into the validity of the marriages of aliens; and in considering the factum of a foreign marriage it is, in a general sense, quite unimportant whether the foreign law, which is to determine its validity, happens to be more strict than our own, as in France, or altogether lax and indefinite (by comparison) as in Scotland. According to general principles, a marriage unduly celebrated in France is primâ facie a nullity in England; whereas a marriage lawfully contracted in Scotland is valid in the courts of this country, without reference to its irregularity. In either case the rules of English law would be inapplicable, and for the purpose of investigating the question, they would be super-

[k] 2 Hagg. Con. 129; 2 Phil. 321.

[l] *Lex loci contractus*, *Scrimshire* v. *Scrimshire*, 2 Hagg. Con. 395; *Middleton* v. *Saverin*, 2 Hagg. Con. 437.

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seded by the law of the country in which the marriage had taken place. In such cases, although the inquiry is in an English court, and the decree the act of an English judge, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the law of the country where the marriage took place.[m]

Exception to the *lex loci contractus*.

Ambassador's chapel houses.

Factories.

British lines.

The only important exception to this rule of the lex loci contractus, having long before been established by universal opinion, was fully recognised by the statute 4 Geo. IV. c. 91, which reciting that it has been thought expedient to relieve the minds of all his majesty's subjects from any doubts concerning the validity of marriages solemnized by a minister of the church of England in the chapel or house of any British ambassador, or minister residing within the country, to the court of which he is accredited, or in the chapel belonging to any factory abroad, or in the house of any British subject residing at such factory; as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines, by any chaplain or other person officiating under the orders of the commanding officer of a British army abroad, enacts, that all such marriages shall be deemed and held to be as valid in law as if the same had been solemnized within his majesty's dominions, with a due observance of all forms required by law.[n] And as to this it has been decided that a marriage abroad in the house of a British ambassador, where one of the parties is a British subject, is valid, as being within the operation of this act.[o] But where a marriage was celebrated abroad, which was not valid according to the *lex loci*, in an English church, in the presence of the English consul, and by a clergyman appointed and paid by the English government, it was nevertheless held invalid: there being no English ambassador accredited there, nor any British factory.[p]

Rules by which the validity of foreign marriages may be tested.

The following rules may be considered as satisfactorily establishing the acknowledged law of this subject.

1st. That the validity of the marriage, both in respect of the competence of the parties to contract, and of the solemnities with which they contract it, is to be decided with reference to the law of the place in which the marriage is contracted; and that if it be valid, *secundum legem loci contractus*, it must be deemed valid in every other place.

2nd. But the *lex loci contractus* is not admitted, when it violates the law of nature, public morals, or the policy

[m] 2 Hagg. Con. 59.
[n] 4 Geo. 4, c. 91.
[o] *Lloyd* v. *Pettijèan*, 2 Curt. 251.
[p] *Kent* v. *Burgess*, 11 Sim. 361.

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or institutions of that state in which its validity is sought to be established.

3rd. It is not admitted when the parties have no *bonâ fide* domicile in *loco contractus*, but have resorted thither to evade a prohibitory law in force in the place of their actual domicile, extending to marriage contracted in any other country, in terms or in effect, and which law has made void a marriage contracted in contravention of its provisions.

4th. The parties are excused from conforming to the *lex loci contractus*, if they belong to a state, the subjects of which form a separate and distinct community in the foreign country in which they are married, as in the case of the British factories established in various parts of Europe and Asia; or if they belong to the state which has taken hostile possession, and is in the occupation of the foreign country; or if they belong to the state whose ambassador is established in the foreign country. In these instances the parties may, observing certain conditions as to place, celebrate their marriage according to the law of their own country.[q]

Marriages of Jews and Quakers.

With respect to Jews and Quakers, their own matrimonial law is acknowledged; that is to say, although living in this country, they possess the privilege of being married according to the ceremonial of their own religion; but both the parties to such marriage must be Quakers[r] or Jews[s] respectively, otherwise the privilege does not exist, and the marriage, according to such ceremonial only, would not be valid.

Marriage not dissolved by a divorce *à mensâ*.

If a prior valid marriage has been had or solemnized, a decree of separation or divorce *à mensâ et thoro* does not so far dissolve it as to allow either party to contract a second marriage; and if such second ceremony was performed, it would equally be a mere nullity; nor can a prior marriage, contracted in England, be so far annulled in a foreign state by a divorce *à vinculo matrimonii*, between parties not *bonâ fide* domiciled there, as to enable them to contract a second marriage. But if the parties, having been married in this country, had a *bonâ fide* domicile in a country which allowed of such divorces, it would be otherwise.[t]

If, after a prior marriage, and while a husband or wife is still living, the ceremony of marriage should be per-

[q] 1 Burge on Conflict of Laws, 190.
[r] *Harford* v. *Morris*, in 1781, before the Delegates.
[s] *Lindo* v. *Belisario*, 1 Hag. Con. 216, where see the form of the ceremony.
[t] See the judgment of Dr. Lushington in *Beasley* v. *Beasley*, 3 Hag. 639.

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formed, that ceremony, being a nullity, will not prevent the party to it, who had not been previously married, from contracting a second marriage at any time.

Second disability.

Want of age.

2. The next legal disability to contract marriage is want of age. This is sufficient to avoid all other contracts on account of the imbecility of judgment of the parties contracting; *à fortiori*, therefore, says Blackstone, it ought to avoid this, the most important of all contracts. Therefore, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law. But the canon law pays a greater regard to the constitution than the age of the parties; for if they are *habiles ad matrimonium*, it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again. If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she may; for in contracts the obligation must be mutual; both must be bound or neither; and so it is *vice versâ*, when the wife is of years of discretion, and the husband under.[u]

Former disability of minors to marry without consent.

Repealed.

Connected with this last disability of want of age, it was at one period the law of this country that all marriages celebrated by license, where either of the parties was under the age of twenty-one years (not being a widow or widower), without the consent of the father, or if he were not living, of the mother or guardians, should be absolutely void; such a provision, however, was found to be contrary to principles of general policy, and has been repealed. Such a marriage, although without consent, is now valid, and the parties could not again contract.[x]

Third disability.

Parties within the prohibited degrees of consanguinity or affinity.

3. Another legal disability to contract marriage is where the parties are related by consanguinity or affinity, such consanguinity or affinity being defined according to the spirit and letter of the Levitical law. That law is that none of you shall approach to any that is next of kin to uncover their nakedness;[y] which words, being general, must be understood and expounded by the examples from the 6th to the 20th verse; among which we find many prohibitions to collaterals in the third degree, both in affinity and consanguinity; but there is no example of

[u] 1 Black. Com. 436, and see note.
[x] See 4 Geo. 4, c. 76.
[y] Leviticus, chapt. 18. v. 6.

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collaterals in the fourth degree, either in affinity or consanguinity, and therefore the law of marriage opens to relations in the fourth degree; and the Jewish lawyers, in computing their degrees, computed them according to the natural order of things; that is, from the propositus up to the common stock, and so down to the other relations, which is the fair and natural order of computing proximity; and in this order of computation, cousin germans are held to be of the fourth degree, and to have liberty to marry.[a]

Mode of computing.

This, likewise, was the ancient sense of the Christian Church, and even of the Church of Rome, in the time of Pope Gregory; for, in writing to Austin, Bishop of Canterbury, he says, *in quartâ generatione contracta matrimonia minimè solverentur;* but afterwards, when they found that dispensations for incestuous marriages brought great profit to the Church of Rome, and knowing it had obtained universally in the Christian Church that it was lawful to marry in the fourth degree, Pope Alexander II. began a new computation of degrees; and he said that the secular computation, which was the computation of the civil law, was not properly adapted to the decisions touching incestuous marriages; but they ought to compute up to the common stock, where the relation joined, because there the blood was connected; and therefore they computed the degrees according to the distance of the person remotest from the common stock; for, according as the remotest was distant from the common stock, so they computed the relation between the parties; so that the first cousins that are in the fourth degree, by the received computation in the Mosaic and civil law, were now by the canonical computation thrown into the second degree; and by this alteration of the computation of degrees, they forbad not only first cousins, but second and third cousins to marry, unless they obtained dispensations.[a]

Innovations of the Church of Rome on the ancient manner of computing degrees.

These innovations, having been introduced by the Church of Rome, occasioned in this country the passing the statute 32 Hen. VIII. c. 38, by which it was declared that no reservation or prohibition (God's law except) shall trouble or impeach any marriage without the Levitical degrees; and that no person, of what estate, degree or condition soever he be, shall be admitted to any of the spiritual courts within the king's realm, or any of his grace's other lands and dominions, to any process, plea or allegation contrary to the statute.[b]

Repudiated in this country by statute.

What these degrees are by our laws held to be is set

[a] Bacon's Abr. Marriage A.
[a] Vaugh. 210; Bacon's Abr. ibid.
[b] 32 Hen. 8, c. 38.

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Archbishop Parker's Table.

forth in a table called Archbishop Parker's Table, referred to in the canons of 1603, and copies of which are found in the Book of Common Prayer, and hung up in churches; and it is declared that all marriages made and contracted within those degrees shall be adjudged incestuous and unlawful, consequently, shall be dissolved as void from the beginning; and the parties so married shall, by course of law, be separated.

And since the statute above mentioned, it has been clearly agreed, that if the spiritual courts proceed to impeach or dissolve a marriage out of the Levitical degrees, that then the temporal courts are to prohibit them; for by that statute all marriages that are out of those degrees are declared to be good and lawful; and therefore, if the spiritual court molest persons in doing that which is declared lawful to be done by the statutes of the realm, they are by the temporal courts to be prohibited, because they exceed their jurisdiction, thus bounded by the temporal law; but where the law has not bounded them, their jurisdiction still continues; and therefore, within the Levitical degrees, they are still judges of incest.[c]

Ecclesiastical courts to be prohibited if they impeach marriage not within the prohibited degrees.

Prohibition extends to relations by affinity, and to illegitimate relations.

All marriages within the third degree according to the Jewish computations are equally void, whether for consanguinity or affinity; thus, the sister of a deceased wife is considered as a sister, and the wife's sister's daughter as a niece; and it seems that a person is restrained from marriage with illegitimate relations within the prohibited degrees, as much as with legitimate ones, because the rules of prohibition of marriage arise out of natural relationship.[d]

Notwithstanding the disability to contract marriage within these prohibited degrees, the common law courts were in the habit of interfering to prohibit the spiritual court from bastardizing the issue after the death of one of the parties; and this created what has been called the unnatural distinction between marriages voidable and void;[e] or, in fact, the marriage was good or bad in law, just as the attention of the spiritual courts happened to be drawn to it during its continuance.

Former distinction of marriages void or voidable for this cause

does not now exist; all such marriages are now void.

This anomalous condition of the law, however, now no longer exists; for it has been recently enacted that all marriages, which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely null and void, to all intents and purposes whatsoever. But marriages which had been

[c] Vaugh. 206; Bacon's Abr. ibid.
[d] 1 Hag. Con. 352.
[e] 1 Curteis, 188.

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contracted previously to the passing of that statute within the prohibited degrees of *affinity* are declared good, except in those cases where a suit was at that time depending. Marriages, however, within the prohibited degree of *consanguinity*, contracted previously to that time, are not declared good, but remain voidable as before.[f]

Fourth disability; want of reason.

4. Another disability to contract marriage is want of reason. It was formerly adjudged that the issue of an idiot was legitimate, and consequently that his marriage was valid;[g] a strange determination, as Blackstone has observed, since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to anything; and therefore the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials, upon this account (concurring with some private family reasons)[h] the statute 15 Geo. II. c. 30, has provided that the marriage of lunatics and persons under phrenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament), before they are declared of sound mind by the Lord Chancellor or the majority of such trustees, shall be totally void.[i]

In all these last-mentioned cases, there has been no prior valid marriage, and the parties who may have apparently contracted under such circumstances, are nevertheless at liberty to marry at any future time. There are some other cases in which marriages duly solemnized are voidable, but into these it does not appear necessary here to enter, since in all such cases the prior marriage is valid, and is so to be considered by the clergyman, until a decree has been pronounced to the contrary in the proper court.

Voidable marriages.

Second essential to validity of marriage; consent.

Secondly. The parties must be willing to contract marriage: *consensus non concubitus facit nuptias*, is the maxim of the civil law in this case, and is adopted by the common law; so that if it could occur that a party were married forcibly, and against his or her will, the ceremony would in such case be a nullity, and some of the cases already

[f] 5 & 6 Will. 4, c. 54.
[g] Roll. Abr. 357.
[h] See private act, 23 Geo. 2, c. 6.
[i] 1 Black. Com. 438.

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mentioned, where parties are unable to contract, may perhaps be equally referable to this head.

Third essential to validity of marriage; must be according to some form sanctioned by law.

Thirdly. Lastly, the parties must actually contract in the proper forms and ceremonies required by law. What are such proper forms and ceremonies, where the marriage is according to the rites of the Established Church, will appear in the following pages. The other forms in which marriage may be had are entirely regulated by, and dependent on, the statute 6 & 7 Will. IV. c. 85: by which it is declared that the marriage of any persons, knowingly and wilfully, under the provisions of that statute—

What marriages are void under 6 & 7 Will. 4, c. 85, not being celebrated according to the rites of the Established Church.

1. In any place other than the church, registered building, office, or other place specified in the notice and certificate;

2. Or without due notice to the superintendent registrar;

3. Or without certificate duly issued;

4. Or without license, in case a license is necessary under that act;

5. Or in the absence of a registrar or superintendent registrar, where his presence is necessary under that Act, shall be null and void.[k]

Preliminaries necessary to a marriage by a clergyman.

If the parties are under none of the disabilities before mentioned, and wish to contract marriage according to the forms of the Established Church, they must proceed, in the first instance, either by publication of banns or by license, or by giving notice to the superintendent registrar and obtaining his certificate.

Banns.

The word banns is of Saxon origin, and signifies publication or proclamation.[l] Its institution, as a means of publicity, may, it is said, be referred to the fourth Lateran Council, A. D. 1215, held during the pontificate of Innocent III., and was adopted from the Roman Catholic Church into our canons at the Reformation. This publication for three several Sundays or holidays, unless a faculty or license had been obtained, was enjoined by the canon law; and by the rubric it is ordered that the banns of all that are to be married together must be published in the church three several Sundays or holidays, in the time of divine service, immediately after the sentences for the offertory.[m] The particular time and place, however, for the publication of banns has been altered by statute, and it has been enacted by statute 4 Geo. IV. c. 76, that from and after the 1st November, 1823, all banns of matrimony shall be published in an audible man-

Time, place, and manner of publication of banns.

[k] 6 & 7 Will. 4, c. 85, s. 42.

[l] Rogers's E. L. 509.

[m] Rubric in Office of Matrimony.

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ner, in the parish church or in some public chapel, in which chapel banns of matrimony may now, or may here after be lawfully published, of or belonging to such parish or chapelry, wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon three Sundays preceding the solemnization of marriage, during the time of morning service, or of evening service (if there shall be no morning service in such church or chapel upon the Sunday upon which such banns shall be published), immediately after the second lesson;[n] and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church, or in any such chapel as aforesaid, belonging to such parish or chapelry wherein each of the said persons shall dwell, and that all other the rules prescribed by the said rubric concerning the publication of banns and the solemnization of matrimony, and not hereby altered, shall be duly observed, and that in all cases where banns shall have been published, the marriage shall be solemnized in one of the churches or chapels where such banns shall have been published, and in no other place whatsoever.[o]

Where church is under repair, or demolished temporarily.

These provisions are so plain and simple that they seem to require no further explanation. Where the parish church or chapel of any chapelry is demolished in order to be rebuilt, or under repair and disused, it is by the same statute provided that banns may be proclaimed in the church or chapel of any adjoining parish or chapelry, in which banns are usually proclaimed, or in any place licensed by the bishop for divine service during the disuse of the church, or in any consecrated chapel of such parish or place which the bishop may order and direct; but as it is enacted that the marriage must be solemnized in one of the churches or chapels where the banns have been published, and in no other place whatever,[p] there is no provision for the possible case of a church demolished in order to be rebuilt, or destroyed in any other manner, between the times of publication of the banns and solemnization of the marriage.[q] It would probably be

[n] It may probably be inferred from this alteration that it was not customary at that time to read the sentences of the offertory generally on every Sunday.

[o] 4 Geo. 4, c. 76, s. 2.

[p] Sect. 13.

[q] A recent case may be remembered where this difficulty might have occurred, in the case of a church in Southwark, which was almost destroyed by fire, and where the parties, in some peril, were married amongst the still smoking ruins.

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sufficient in such a case, to conform as nearly as possible to the statute; for where, before the passing of the above statute, a marriage had been solemnized on the site or ruins of a church, and the banns had been published in the church of the adjoining parish, it was held that the marriage was good, for that the parties had done all they could to comply with the law.[q]

Banns must be published where marriage is to be solemnized.

We shall have occasion to mention hereafter in what places, churches or chapels, marriages, according to the rites of the Church of England, are to be solemnized; here it may be sufficient to observe, that in all places where marriages may be solemnized, there also the banns must be published.

The mode which appears to have been contemplated by the statute 6 & 7 Will. IV. c. 85,[r] seems to have been that the banns should be published in the parish church, although the marriage was solemnized in the chapel licensed under the provisions of that act; for by that act there was no authority given for the publication of banns in such chapels; that authority, however, was given in the following year by the statute 1 Vict. c. 22; and by the same act it was declared, that where the parties to any marriage, intended to be solemnized after publication of banns, should reside within different ecclesiastical districts, the banns for such marriage should be published, as well in the church or chapel in which such marriage should be intended to be solemnized, as in the chapel licensed under the provisions of the 6 & 7 Will. IV. c. 85, for the other district within which one of the parties was resident; and if there should be no such chapel, then in the church or chapel in which the banns of such last-mentioned party might have been legally published if the said act had not been passed.[s]

No clergyman should solemnize marriage but in the place where the banns have been published.

This, therefore, now renders it imperative on the clergyman, where the marriage is by banns, to solemnize it in no other place than where the banns have been published: and where either of the parties are living within a district in which there is a chapel, licensed in such manner as we shall presently mention for solemnization of marriages, then that chapel, and not, as it seems, the parish church, is the proper place for the publication of the banns.

Seven days' notice of names, place and time of abode of the parties, to be given to the minister.

No parson, vicar, minister or curate is *obliged* to publish the banns of marriage between any persons whatsoever, unless the persons to be married shall, *seven days at the least* before the time required for the first publication of

[q] *Stallwood* v. *Tredgear*, 2 Phill. 287.

[r] See sects. 26 and 29.

[s] 1 Vict. c. 22, s. 34.

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such banns, deliver or cause to be delivered to such parson, vicar, minister or curate, a notice in writing, dated on the day on which the same shall be so delivered, of their true christian names and surnames, and of the house or houses of their respective abodes within the parish or chapelry, and of the time during which they have dwelt, inhabited or lodged in such house or houses respectively.[t]

Such notice not necessarily to be required by the minister.

It will be here observed, that although the clergyman is not obliged to publish the banns without this notice, yet neither is he forbidden to publish them without that, or indeed without any other particular notice. In this respect, therefore, he is left to act according to his discretion, or to any general rules he may think proper to make upon the subject in his particular parish. In a case in 1801, the Lord Chancellor commented severely upon what was declared in an affidavit made by the clerk to have been the practice of the parish church at Lambeth, namely, that it was not customary to make any inquiry as to the residence of parties applying to be married, the marriage in that case, as it appears from what is said by the Lord Chancellor, having been by banns.[u]

Opinion of Lord Eldon.

Clergyman who dispenses with the notice, must take the possible consequences.

As the legislature has most anxiously provided for the clergyman the means of knowing and ascertaining who the parties are who apply to him for the publication of their banns, by allowing him to require due notice to be given, he must take upon himself the consequence of his neglect, if he chooses to dispense with that notice, and if it should prove that the parties were not entitled to have had the banns published in that parish. Upon which subject the following remarks were made by Lord Eldon:—

Remarks of Lord Eldon on the practice of publication without notice.

"With regard to the clergyman, a notion seems to prevail, that every thing is correct, if a paper describing the parties between whom banns are to be published, being handed up to the clergyman in the usual manner during the service, he publishes them without more. It is true that a marriage by banns is good, though neither of the parties was resident in the parish; but if a clergyman, not using due diligence, marries persons, neither of whom is resident in the parish, he is liable at least to ecclesiastical censure, perhaps to other consequences. It has been uniformly said, especially as to marriages in London, that the clergyman cannot possibly ascertain where the parties are resident; but that is an objection which a court, before whom the consideration of it may come, cannot hear. The act of parliament has given the means of making the inquiry, and if the means provided are not sufficient, it is

[t] 4 Geo. 4, c. 76, s. 7.

[u] *Priestley* v. *Lamb*, 6 Ves. 421.

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not a valid excuse to the clergyman who has not used those means, that he could not find out where the parties were resident, or either of them. If he has used the means given to him and was misled, he is excusable; but he can never excuse himself if no inquiry was made."[x]

Meaning of due publication of banns.

And in another case, Lord Eldon, alluding to the very heavy penalties inflicted by the canon law upon clergymen celebrating marriage without license or a due publication of banns, says, "that such due publication must be interpreted a publication of banns by persons having, to the best of their power, informed themselves that they publish banns between persons resident in the parish."[y]

In a case before Lord Stowell, he expressed his regret at the loose practice in giving notice of banns; but he does not so strongly allude to the penal consequences to the clergyman.[z]

Publication of banns in false names.

The publication of banns in false names seems, so far as the clergyman is concerned, to be included in all the observations made by Lord Eldon; for although he might not have been able to detect the fraud, yet if he had published the banns without notice, and thereby prevented himself from attempting to detect it, it seems there would be no excuse.

Effect of, formerly.

As to the effect of the publication of banns in wrong names, there has been some considerable variation in the law. Formerly, as Lord Stowell says, the publication of false names formed an *impedimentum dirimens*, invalidating the marriage *in toto;* and this, he says, arises from the very nature of the thing, and the intent and nature of the publication.[a]

Present state of the law.

But the law, as now settled by the statute 4 Geo. IV. c. 76, is more agreeable to reason and common sense. By that statute it is provided, that if any person shall *knowingly and wilfully* intermarry without due publication of banns, the marriages of such persons shall be null and void to all intents and purposes whatsoever.[b] Upon which it has been decided, that both parties must have been cognizant of the undue publication before the marriage was celebrated; for it is not sufficient merely to show that the knowledge existed after the marriage had taken place. So that, in fact, no marriage by banns is voidable on account of any *mistake or error* in names of both parties, or even of the *fraud* of one party; but the marriage can only be vitiated by such circumstances of wilful fraud and con-

[x] *Nicholson* v. *Squire*, 16 Ves. 261. [y] *Priestley* v. *Lamb*, 6 Ves. 421.
[z] *Pouget* v. *Tomkins*, 2 Hagg. Con. 146.
[a] *Sullivan* v. *Sullivan*, 2 Hagg. Con. 252. [b] 4 Geo. 4, c. 76, s. 22.

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spiracy between the contracting parties, as would vitiate any transaction whatsoever.[c]

It would therefore be of little practical use, even if it appeared to fall more immediately within the scope of this work, to enter into the various cases in which a wrong publication of names has been, to use the language of Lord Stowell, held to be *impedimentum dirimens* or not; nor does it seem possible to lay down satisfactorily any rules with regard to the evidence of fraud, that would be required to determine the character of the transaction; each case in that respect must depend upon its particular circumstances.

Clergyman celebrating marriage between parties, one of whom is a ward of court.

There is one case in particular where a clergyman not using proper precaution, nor availing himself of the protection which the law gives him, previously to solemnizing matrimony, may subject himself to much inconvenience and to very serious consequences, as if he should solemnize marriage between parties, one of whom was a ward of the Court of Chancery, without the leave of that court. In such a case it has been held, that it would be no excuse to the clergyman that he did not know the fact that the party was a ward of court, for a matter of this kind appears to be one of which every person at his peril is concerned to take notice.[d] And, in an old case, the clergyman appears to have been committed, and remained long in custody, although he was ignorant of the fact.[e] Now, however, the usual course under such circumstances appears to be, that the clergyman is ordered to attend in court on a given day, and if it shall then appear that he used all proper precaution, and was not aware that the party was a ward of court, he would be deemed exculpated and absolved from further consequences; otherwise he would be committed to prison for contempt of court.[f] Where the young woman married appeared evidently to be under age, Lord Rosslyn, then Lord Chancellor, severely reprimanded the clergyman.[g]

Form of words for publication of banns.

The form of words in which the publication of the banns of marriage is to be made, is prescribed by the rubric; and it is further directed by the 4 Geo. IV. c. 76, that the form of words to be used shall be such as the rubric prescribes.

[c] 1 Curt. 42.

[d] Master of the Rolls, in *Mr. Herbert's case*, 3 P. Wms. 116.

[e] *Hennes* v. *Waugh*, cited by M. R. in *Eyre* v. *Countess of Shaftesbury*, 2 P. Wms. 112; and see former case.

[f] *Priestley* v. *Lamb*, 6 Ves. 421; *Nicholson* v. *Squires*, 16 Ves. 259; *Warten* v. *Yorke*, 19 Ves. 451.

[g] *Millet* v. *Rouse*, 7 Ves. 419.

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Forbidding the banns.

If, upon publication of the banns, any person should openly declare his dissent, and upon inquiry it should nevertheless turn out that there was no valid or sufficient cause for such dissent, the publication for that time would stand good.

Grounds for forbidding banns in case of adult persons.

As to what are sufficient causes for dissent in the case of adult persons, it may be considered that all such matters as we have before mentioned, which would render the marriage ceremony void and a mere nullity if performed, are good causes of dissent, which any person, whether connected with or interested in the parties or not, might properly allege; for all persons are interested in the preservation of morality. If, therefore, it were known to any of the congregation that either of the parties had a former husband or wife living at the time, or that they were related within any of the forbidden degrees of consanguinity or affinity, or that either of them was under the age of fourteen years, if a boy, or twelve years, if a girl, or that either of them was an idiot or a lunatic, such person might properly dissent from the publication of the banns, or, as it is called, forbid the banns, for any of such reasons. But on no other grounds than some of these does it appear that the publication of banns, in the case of adult persons, could be properly forbidden, and the clergyman would not be bound, and ought not to take notice of a dissent from such publication an any other grounds.

In the case of minors, parents and those *in loco parentis* may forbid banns.

In the case of minors, it has been expressly enacted, that where both or either of the parties between whom the banns are published, are under the age of twenty-one years, and the parents or guardians of such parties openly and publicly declare, or cause to be declared, in the church or chapel where the banns are published, at the time of such publication, his, her or their dissent to such marriage, such publication of banns shall be void;[h] which provision would extend to all such persons as, in contemplation of law, stand *in loco parentis* to such party under age; but even if this were not done, and the clergyman nevertheless had notice of the dissent of such parents or guardians before the marriage, he would be punishable if he performed the ceremony.[i]

Clergyman having notice of dissent of parents, &c.

Publication of banns and consent of parents formerly necessary by the canon law.

And the canon law was still more stringent in this respect, for ministers were forbidden to celebrate marriage between persons under age, though the banns were thrice asked, until the parents or governors had, either personally

[h] 4 Geo. 4, c. 76, s. 8.

[i] See the canon, which does not appear to be altered in this respect by the statute.

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or by sufficient testimony, testified to them their consent; but the same clause of the statute, which we have just mentioned, exempts the minister from punishment, to which he might have been liable under this canon, by declaring that no minister shall be liable to ecclesiastical censures for solemnizing the marriage of a minor, unless he has notice of the dissent of parents or guardians, in which case, as we have observed, he would remain liable to punishment for disobedience to the canon.

Book to be provided for entry of banns.

The churchwardens and chapelwardens are to provide a proper book of substantial paper, marked and ruled respectively in manner directed for the register-book of marriages; and the banns are to be published from the said register-book by the officiating minister, and not from loose papers, and after publication are to be signed by the officiating minister, or some person under his direction.[k]

When a republication of banns is necessary.

Whenever a marriage shall not be had within three months after the complete publication of banns, no minister shall proceed to the solemnization of the same, until the banns shall have been republished on three several Sundays in the form and manner prescribed, unless after such time the parties choose to obtain a license. The publication of banns therefore, unless followed by marriage within three months, is a nullity. It is not specified in the act whether these are to be calendar or lunar months; but according to the calculation generally in ecclesiastical matters, they would be calendar months; and that this would be so considered appears certain from the recent act 6 & 7 Will. IV. c. 85, where it is enacted, that, in marriages under that act, if the marriage is not had within *three calendar* months after notice entered with the superintendent-registrar, the license granted thereupon shall be void.

License.

If the parties purposing to contract matrimony intend to proceed by license, the clergyman will of course be less immediately concerned in the preliminaries; but where there has been no publication of banns, or registrar's certificate instead, he is severely punishable for solemnizing marriage, unless a license has been first had and obtained from some persons or person having authority to grant the same;[l] and although the license may be an authority for him to solemnize a marriage without publication of banns, yet if he discover any variation in the license, he may without impropriety, or, as it seems, it might have been said, he ought to hesitate to act upon it;[m] and if he has

How far a minister is to look to the correctness and sufficiency of a license.

[k] 4 Geo. 4, c. 76, ss. 6 and 15.
[l] 4 Geo. 4, c. 76, s. 21.
[m] 2 Hagg. Cons. 185.

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fairly any reason to suspect fraud, delay is justifiable for the sake of inquiry.[n] Consequently it becomes necessary to inquire what the license is, and who have authority to grant it.

What a license is, and by whom to be granted.

A license is a faculty for dispensing with the necessity of publication of banns, and not to be granted for solemnization of matrimony, without publication of banns, by any person exercising any ecclesiastical jurisdiction, or claiming any privileges in the right of their churches, but only by such as have episcopal authority, or the commissary for faculties, vicars general of the archbishops and bishops, *sede plenâ*, or *sede vacante*, the guardian of the spiritualties, or ordinaries exercising of right episcopal jurisdiction in the several jurisdictions respectively.[o]

And no license shall be granted but to such persons only as be of good quality, and no license shall be granted but upon good cause and security taken,[p] which security shall contain these conditions, that at the time of granting such license there is not any impediment of pre-contract, consanguinity, affinity, or other lawful cause to hinder the same; that there is not any controversy or suit depending in any court before any ecclesiastical judge, touching any contract or marriage of either of the said parties with any other; that they have obtained thereto the express consent of their parents (if they be living), or otherwise of their guardians or governors. Lastly, that they shall celebrate the said matrimony publicly in the parish church or chapel where one of them dwelleth, and in no other place, and that between the hours of eight and twelve in the forenoon.[q]

Requisites formerly before license could be obtained.

And for the avoiding of all fraud and collusion in the obtaining of such licenses and dispensations, before such license shall be granted it shall appear to the judge by the oaths of two sufficient witnesses (one of them to be known either to the judge himself or to some other person of good reputation then present, and known likewise to the said judge), that the express consent of the parents or parent (if one of them be dead), or guardians or guardian of the parties, is thereunto had and obtained; and furthermore, that one of the parties shall personally swear that he believeth that there is no let or impediment of pre-contract, kindred or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony according to the tenor of the aforesaid license.[r]

[n] 2 Lee, 515; Rogers's E. L. [o] Canon 101. [p] Canon 101.
[q] Canon 102; and see Bacon's Abr. Marriage. [r] Canon 103.

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The provisions of these canons have been mentioned to show the care and anxiety of the ecclesiastical law to prevent any evil that might result from the practice of granting licenses. But they are now superseded by the statute law, which has substituted requirements less stringent; for instead of the oaths of two sufficient witnesses (one of them known to be of good reputation, &c.), the oath of one of the parties is now sufficient, an alteration for which it is difficult to conceive any sufficient reason; the clauses of the statute, which have superseded the provisions of the canons, enact that before any such license be granted, one of the parties shall personally swear before the surrogate, or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony according to the tenor of the said license; and that one of the said parties hath, for the space of fifteen days immediately preceding such license, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons, whose consent to such marriage is required under the provisions of this act, had been obtained thereto: provided always, that if there shall be no such person or persons having authority to give such consent, then, upon oath made to that effect by the party requiring such license, it shall be lawful to grant such license, notwithstanding the want of any such consent.[r]

Oath of one of the parties only is now required.

Requisites now necessary, and oath to be made by party obtaining license.

And it is further enacted, that it shall not be required of any person applying for any such license, to give any caution or security, by bond or otherwise, before such license is granted, any thing in any act or canon to the contrary notwithstanding.[s]

No caution or security now required.

The parties who are empowered, under different circumstances, to give the requisite consent in the case of minors, are next specified; it being provided that the father, if living, of any party under the age of twenty-one (such party not being a widower or widow); or if the father be dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, *if unmarried*; and if there be no mother unmarried, the guardian or guardians of the person

By whom consent is to be given in case of parties under age.

[r] 4 Geo. 4, c. 76, s. 14. [s] Ibid. sects. 15, 16.

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appointed by the Court of Chancery, if any, or one of them, shall have authority to give consent to the marriage of such party; and such consent is required for the marriage of such party so under age, unless there shall be no person authorised to give such consent.[t]

In what cases parties may apply to the Court of Chancery for consent.

In case the father or fathers of the parties to be married, or of one of them, so under age, shall be *non compos mentis*; or the guardian or mother, whose consent is made necessary, as aforesaid, to the marriage of any such parties, shall be *non compos mentis*, or in parts beyond seas, or shall unreasonably, or from undue motives, refuse or withhold his or her consent to a proper marriage; then it shall and may be lawful for any person desirous of marrying in any of the above cases, to apply by petition to the chancellor, lord keeper, or lord commissioners of the great seal of Great Britain for the time being; master of the rolls, or vice-chancellor of England, who is and are respectively empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall, upon examination, appear to be proper, the said lord chancellor, &c., shall judicially declare the same to be so; and such judicial declaration shall be deemed and taken to be as good and effectual as if the father, guardian, or mother of the person so petitioning, had consented to such marriage.[u]

Parties obtaining license by perjury or fraud in such cases.

If any valid marriage has been solemnized by license between parties, one or both of whom shall be under age, contrary to the provisions of the act, the license having been obtained by perjury or fraud, the guilty party may be made to forfeit all property accruing from the marriage, provided such forfeiture is sued for in the manner directed by the act; and such property may be secured in such manner as the act directs, for the benefit of the issue of the marriage, or according to the circumstances in such manner as the Court of Chancery may think fit.[x]

Extent of the last-mentioned provision.

In the case of a father withholding his consent to the marriage of a minor, an important decision has been come to by the Court of Chancery, that the court can only interfere upon petition, according to the provisions above mentioned, where the father is *non compos mentis*, that the words "any of them whose consent, &c.," refer to the persons named in the immediately preceding member of the sentence, viz. the "guardian or guardians, mother or mothers;" and that the discretionary power of consent vested in the judges of the court, in case the consent should be withheld unreasonably, or from undue motives, applies exclusively to the case of such guardian or mother so acting. And the

Applies to the case of a father only when he is *non compos mentis*.

[t] 4 Geo. 4, c. 76, sects. 15, 16. [u] Sect. 17. [x] Sect. 23.

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lord chancellor subsequently mentioned that he had looked over the act with the vice-chancellor, and that they were clearly of opinion that its provisions did not extend to the case of a father beyond seas, or unreasonably withholding his consent, but only to the case of a father who was *non compos*.[x]

No surrogate, hereafter to be deputed by any ecclesiastical judge who hath power to grant licenses, shall grant any such license till he hath taken an oath before the said judge, or before a commissioner appointed by commission under the seal of the said judge, which commission the said judge is hereby authorized to issue, faithfully to execute his office according to law, to the best of his knowledge.[y]

Surrogate deputed by ecclesiastical judge to take oath of office.

There is the same limitation as to time within which the marriage must be solemnized after license granted, as in the case of banns, it being enacted, that whenever a marriage shall not be had within three months after the grant of a license by any archbishop, bishop, or any ordinary, no minister shall proceed to solemnize marriage till a new license be granted, or banns published; which months, as we have observed in speaking of publication of banns, must be taken to be calendar months.[z]

When a fresh license is necessary.

No license is to be granted to solemnize marriage, except in the church or chapel belonging to the parish or chapelry where one of the parties has resided for fifteen days immediately before the granting of such license; but where such church is rebuilding, or under repair, the license shall extend to any licensed place in the parish or chapelry, or, if there be none, then to the church or chapel of the adjoining parish or chapelry.[a]

One of the parties must have resided fifteen days in the parish before license is granted.

Besides the common licenses, special licenses are sometimes granted, to obtain which the same form is required as for common licenses: the material difference is, that by special licenses the marriage is permitted to be solemnized at any time, in any church or chapel, or other meet or convenient place.[b]

Special licenses, how different from common licenses.

By a regulation of Archbishop Secker, special licenses, dispensing with both time and place, are not to be granted, excepting to persons of the rank of peers, or peeresses in their own right, dowager peeresses, members of the privy council, the judges of Westminster Hall, baronets, knights, and members of parliament; but this regulation does not bar the Archbishop of Canterbury from granting occasional favours beyond these limits. In all cases, a special fiat is addressed by his grace to the master of the faculties. To

To whom they may be granted.

[x] *Ex parte J. C.*, an infant, 3 Mylne & Craig, 471. [y] Sect. 18.
[z] Sect. 19. [a] Sects. 10 and 12. [b] Rogers's E. L.

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persons of inferior rank, a special license, dispensing with the particular parish required by the act, or with the canonical hours, is sometimes granted on a particular application.[c]

This power to grant faculties, dispensations, and licenses, as the pope had done before, was given to the Archbishop of Canterbury by the statute 25 Hen. VIII., and it is expressly reserved to him by 4 Geo. IV. c. 76, which expressly declares that nothing therein contained shall be construed to extend to deprive the Archbishop of Canterbury and his successors, and his or their proper officers, of the right which hath hitherto been used, of granting special licenses to marry at any convenient time or place.[d]

Power of the pope in this matter was transferred to the primate.

Caveat, when entered, no license to issue till matter has been examined by the judge.

In the case of a license, the entry of a caveat is tantamount to the public dissent from the publication of banns; for if any caveat be entered against the grant of any license for a marriage, such caveat being duly signed by or on the behalf of the person who enters the same, together with his place of residence, and the ground of objection on which his caveat is founded, no license shall issue till the said caveat, or a true copy thereof, be transmitted to the judge out of whose office the license is to issue; and until the judge has certified to the registrar that he has examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the license for the said marriage, or until the caveat be withdrawn by the party who entered the same.[e]

And what we have already mentioned as to the parties by whom, and the causes for which banns may be forbidden, would be equally applicable to the entry of caveats.

Certificate of the superintendent registrar.

The parties intending to contract marriage, according to the rites of the Church of England, may also, if they please, proceed, by giving notice, and obtaining the certificate of the superintendent registrar; but this is so recent an innovation upon the old law, that little more is to be said of it than what is to be found contained in the acts by which it has been introduced.

The mode of giving notice in order to obtain, and the mode of obtaining or forbidding the issue of this certificate, is prescribed by the statute 6 & 7 Will. IV. c. 85, by which act it was declared that where, by any law or canon in force before the passing of the act, it was provided that any marriage might be solemnized after publication of banns, such marriage might be solemnized in like manner on production of the registrar's certificate.

[c] Poynter's Law of Marriage, 51. [d] Sect. 20. [e] Sect. 11.

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Licenses by the superintendent registrar.

But the same act contained provisions, in which we are not now interested, for enabling the superintendent registrar also to grant licenses; as to which it was provided that nothing therein contained should authorise any superintendent registrar to grant any license for marriage in any church or chapel, in which marriages might be solemnized according to the rites of the Church of England, or in any church or chapel belonging to the Church of England, or licensed for the celebration of divine worship, according to the rites and ceremonies of the Church of England.[f]

Distinction between certificate and license.

The distinction between the certificates and licenses not having been accurately observed, it was doubted whether a party having obtained a superintendent registrar's certificate could insist upon being married in a church, according to the rites of the Church of England; and accordingly, in an act passed in the following year, the provision of the last-mentioned act in this respect was recited, and it was then declared that the giving of notice to the superintendent registrar, and the issue of the superintendent registrar's certificate, should be used, and stand instead of the publication of banns, to all intents and purposes, where no such publication should have taken place; and that every parson, vicar, minister, or curate in England, should solemnize marriage after such notice and certificate *in like manner* as after due publication of banns: provided that the church wherein any marriage according to the rites of the Church of England should so be solemnized, should be within the district of the superintendent registrar by whom such certificate should have been issued.[g]

The certificate is in place of banns.

How far a minister is concerned in it.

Although the clergyman has nothing to do with, and is in no way concerned in, the obtaining this certificate, yet it may be presumed by analogy to the cases of banns and licenses, that he would properly hesitate to perform the ceremony, if he had reason to believe that the certificate was informal, or had been improperly obtained: it becomes necessary therefore to see what the provisions are by which the issue of this certificate is regulated.

Form of the notice to be given, and time of giving.

In order to obtain such certificate, one of the parties must give a notice under his or her hand, in the form which is prescribed by the act, and which is to be found inserted in the appendix,[h] or to the like effect, to the superintendent registrar of the district within which the parties shall have dwelt, for not less than seven days then next preceding: or, if the parties live in different districts, the

[f] 6 & 7 Will. 4, c. 85, s. 11. [g] 1 Vict. c. 22, s. 36. [h] See App.

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like notice is to be given to the superintendent registrar of each district.[i]

It seems by the words "*to the like effect*," that it would not be necessary to keep the exact form of the prescribed notice: for the several matters which the notice must contain are further specified in the act to be,

What the notice must contain

The name, and surname, and the profession or condition of each of the parties intending marriage.

The dwelling-place of each of them.

The time (not being less than seven days) during which each has dwelt therein.

And the church or other building in which the marriage is to be solemnized.

If either of the parties shall have dwelt in the place stated in the notice during more than one calendar month, that fact may be stated in the notice.[k]

If the notice contained all these particulars, although it were not in the prescribed form, it is presumed that it would be good and valid.

Marriage notice book; entries to be made in, and fee for entering.

The superintendent registrar is to file such notices, and enter them in a book, to be called "The Marriage Notice Book," and he is entitled to a fee of one shilling for every such entry.[l]

Publication of the notices at board of guardians.

The publication of these notices is to be made in the following manner. If the superintendent registrar be the clerk of the guardians of any poor-law union, or of any parish or place, comprising the district for which such superintendent shall act, he is to read all these notices at the next weekly meeting of the union, immediately after the minutes of the preceding meeting have been read; or if he is not such clerk, then he is to transmit them to such clerk, the day before such weekly meeting, in order to their being so read. The notices transmitted to the clerk of the board of guardians shall be read three several times, in three successive weeks, at the weekly meetings of such guardians, unless, in any case, license for marriage shall be sooner granted, and the notice of its being granted shall be given to such clerk.[m]

And, if there be not three successive meetings of the guardians, then it is declared that it shall be sufficient that the notice shall be read at any meeting of such guardians, held within twenty-one days from the day of such notice being entered.[n]

Mode of publication where there are no guardians.

But, as it may happen in some districts that there may be no such guardians, it is provided that in every such case, but only until the election of such guardians, and a

[i] 6 & 7 Will. 4, c. 85, s. 4. [k] Ibid. [l] Sect. 5.
[m] Sect. 6. [n] Ibid.

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clerk to their board, every such notice of marriage, or a copy thereof, under the hand of the superintendent registrar, shall be suspended in some conspicuous place in his office during twenty-one successive days, before any marriage shall be solemnized in pursuance of it, and the particulars of every such notice shall be sent by the superintendent registrar to every registrar of marriages within his district, and shall be open to the inspection of every one who shall apply, at reasonable times, to such registrar to inspect the same.[o]

Certificate of superintendent registrar; where and how to be issued.

After the expiration of twenty-one days after the entry of such notice of marriage, the superintendent, upon being requested so to do, by or on behalf of the party by whom such notice was given, is to issue under his hand a certificate, in a prescribed form, which is to be found in the Appendix;[p] provided that no lawful impediment be shown to the satisfaction of such superintendent registrar why such certificate shall not issue; and provided the issue of such certificate shall not have been forbidden, as provided for by the act.[q]

Contents of the certificate.

And the certificate is to contain the particulars set forth in the notice, the day on which the notice was entered, and that the full period of twenty-one days has elapsed since the entry of such notice, and that the issue of such certificate has not been forbidden.[r]

Fee for issue of the certificate.

The fee to which the superintendent registrar is entitled upon the issue of every such certificate is one shilling.[s]

Every such certificate is to be printed with black ink.[t]

Manner of forbidding the issue of the certificate.

Any person authorised in that behalf may forbid the issue of the superintendent registrar's certificate, by writing, at any time before the issue of such certificate, the word "forbidden" opposite to the entry of the notice of such intended marriage in the marriage notice book, and by subscribing thereto his or her name and place of abode, and his or her character in respect of either of the parties, by reason of which he or she is so authorised; and in case the issue of any such certificate shall have been so forbidden, the notice and all proceedings thereupon shall be utterly void.[u]

Caveat may be entered against the grant of the certificate.

Or any person, on payment of five shillings, may enter a caveat with the superintendent registrar against the grant of a certificate for the marriage of any person named therein; and if any caveat be entered with the superintendent registrar, such caveat being duly signed by or on behalf of the person who enters the same, together with his or her

[o] 1 Vict. c. 22, s. 24. [p] See App. [q] 6 & 7 Will. 4, c. 85, s. 7.
[r] Ibid. [s] Ibid. [t] Sect. 8. [u] Sect. 9.

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Effect of entering a caveat.

place of residence, and the ground of objection on which his or her caveat is founded, no certificate shall issue or be granted until the superintendent registrar shall have examined into the matter of the caveat, and be satisfied that it ought not to obstruct the grant of the certificate, or until the caveat be withdrawn by the party who entered the same: provided, that in cases of doubt, it shall be lawful for the superintendent registrar to refer the matter of any such caveat to the registrar general, who shall decide upon the same; in case of the superintendent registrar refusing the grant of the certificate or license, the person applying for the same shall have a right to appeal to the registrar general, who shall thereupon either confirm the refusal or direct the grant of the certificate.[y]

Who may enter such caveat.

The persons who would be authorised in this manner to forbid the issue of a certificate, or to enter a caveat, are of course the same as we have before mentioned would be authorised to forbid the publication of banns, or to enter a caveat to licenses, if the parties had proceeded in either of those manners.

But parties, who may choose to proceed by obtaining the superintendent registrar's certificate, appear to have a better protection given them against having their proceedings forbidden, than those who proceed by banns or a surrogate's license; for every person who shall enter a caveat with the superintendent registrar against the grant of any license or issue of any certificate, on grounds which the registrar general shall declare to be frivolous, and that they ought not to obstruct the grant of the license, shall be liable for the costs of the proceedings, and for damages, to be recovered in a special action upon the case by the party against whose marriage such caveat shall have been entered.[z] The mode of proceeding in which actions is further regulated by the statute 1 Vict. c. 22.

Proceedings against parties who may enter caveats on frivolous grounds.

Marriage must not be within twenty one days after entry of the notice.

No marriage by certificate may be celebrated until twenty-one days after the entry of the notice with the superintendent registrar.[a]

When a fresh notice is necessary.

Whenever a marriage shall not have been had within three calendar months after the notice shall have been entered by the superintendent registrar, the notice and certificate, and all other proceedings, shall be utterly void; and no person shall solemnize a marriage until a new notice, entry and certificate, be given as before.[b]

The same statute allows superintendent registrars to issue licenses for marriage, and prescribes certain requisite forms to be observed in obtaining them; but, as we have already

[y] Sect. 13. [z] Sect. 37. [a] Sect. 14. [b] Sect. 15.

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seen, that such licenses cannot be granted for marriages to be solemnized according to the rites of the Established Church, it is not necessary here to enter upon the subject.

We have now gone through the preliminaries to the solemnization of marriage according to the different modes which the parties may choose to adopt; and the clergyman may require to be reasonably satisfied that one of these modes has been observed before he can be called on to perform the ceremony. Previously to the performance of such ceremony, in the case of banns (if the publication of them in respect of either of the parties not residing within his parish has been made by the minister of another parish), a certificate of that fact under the hand of such minister should be produced; and which certificate, although no form is absolutely prescribed, is usually in the form to be found in the Appendix.

Certificate that the banns have been published by clergyman of another parish.

In the case of licenses, such license must be produced. In the case of certificates, it is expressly provided, that the superintendent's certificate, or in case the parties have given notice to the superintendent of different districts, the certificate of each superintendent shall be delivered to the officiating minister.[c]

Such ceremony of marriage, if solemnized according to the form of our ancestors, must, notwithstanding the recent alteration of the law, still be—

Essentials to a regular marriage according to the forms of the Established Church.

1. In a church. *In facie ecclesiæ.*

2. Performed by a minister of the Established Church. *Per presbyterum sacris ordinibus constitutum.*

3. According to *all* the rules prescribed by the rubric of that Church.

4. Within the canonical hours of eight and twelve in the forenoon.

5. In the presence of a proper number of witnesses.

Old constitutions of the Church.

By a constitution of Archbishop Reynolds, marriage shall be solemnized reverently and in the face of the church; and by a constitution of Archbishop Mepham, it was ordained, that every priest, whether regular or secular, who dared celebrate or be present at the solemnization of marriage anywhere, save in the parish church, without special license of the diocesan, should be suspended from his office for one whole year.[d]

And by the canons of 1603, it was further ordered, that no minister, on pain of suspension for three years *ipso facto*, should celebrate marriage between any persons in any other place but in the churches or chapels where one of them dwelt;[e] but the canon law did not and could not

[c] Sect. 16. [d] Lindwood, 274. [e] Canon 62.

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declare a marriage elsewhere than in a church in itself void; and as many clergymen might be beyond the reach of ecclesiastical punishment, the consequence of this was that many marriages were irregularly solemnized by persons in holy orders in the Fleet Prison and its liberties, in May Fair, and in such like places, and in private houses.

Irregular marriages.

Punishment of clergyman for celebrating marriage elsewhere than in a church.

These irregularities were put a stop to by the statute 26 Geo. III.; but the provisions of that act were repealed by, and in many particulars re-enacted by, 4 Geo. IV. c. 76, by which the law is at present regulated, and by which it is declared, that if any person shall solemnize matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, he shall, upon being convicted thereof, be deemed and adjudged to be guilty of felony, and shall be transported for the space of fourteen years, provided such prosecutions are commenced within three years after commission of the offence.[f]

This provision is re-enacted by the 6 & 7 Will. IV. c. 85; and the words are there more clearly expressed, as any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England; and it is there said only that the offending party shall be adjudged guilty of felony, the punishment not being mentioned.[g] A less punishment than that above mentioned might, as it appears, be now inflicted.

What may be such churches in which marriages may be solemnized.

Besides the parish church, the bishop of the diocese, with the consent of the patron and incumbent of the church of the parish in which there was any public chapel with a chapelry annexed, or of any chapel in an extra-parochial place, signified to him under hands and seals respectively, might under that act authorise by writing under his hand and seal the publication of banns and solemnization of marriages in such chapel, for persons residing within such chapelry or extra-parochial place, such consent, together with such written authority, to be registered in the registry of the diocese.[h] In every such chapel, where such authority has been given, there is to be placed in some conspicuous part of the interior a notice in the words following: "Banns may be published and marriages solemnized in this chapel."[i]

Extra-parochial places and parishes where there is no church or chapel.

Parishes where there is no church or chapel, and extra-parochial places, are to be taken, for the purposes of that act, in respect of marriages, to belong to any adjoining parish or chapelry.[k] And where a church or chapel is demolished, in order to be rebuilt or under repair, and on

[f] 4 Geo. 4, c. 76, s. 21.
[g] 6 & 7 Will. 4, c. 85, s. 39.
[h] 4 Geo. 4, c. 76, s. 3.
[i] Ibid. s. 4.
[k] Sect. 12.

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that account disused, and no place licensed by the bishop within the limits of the parish or chapelry for the performance of divine service or the publication of banns, then, inasmuch as the banns may have been published in the church or chapel of the adjoining parish or chapelry, the marriage may also be solemnized in the same church or chapel where the banns were published.

All acts of parliament relating to publishing banns of marriage and marriages shall apply to all separate and distinct parish churches, and to all district churches and chapels built under the authority of the two acts of the 58 & 59 Geo. III.; but in order that there might be no interference with existing rights in the matter of fees, it was provided that no banns should be published or marriages solemnized in such churches or chapels, except by the incumbent of the parish or his curate, till the death, resignation, or other avoidance of the person who was incumbent at the time of the consecration of such church or chapel.[k] And, by an act passed in the following year, these powers were extended to all churches or chapels of ecclesiastical districts or consolidated chapelries; and by the same statute, in cases of chapels of ease to which ecclesiastical districts are attached, the commissioners have power, with consent of the bishop, to determine whether banns shall be published, or marriages had, in such chapels or not; and if they so determine, then the boundaries of the district assigned to such chapel are to be enrolled in the Court of Chancery and in the registry of the diocese.[l]

To what churches and chapels the acts of parliament as to marriages were made to relate by 59 Geo. 3, c. 134.

Another statute on the same subject seems to recognise the sanction of custom, however recently established, in determining in what churches or chapels marriages may be solemnized; for it is declared that all marriages which had been solemnized in churches and public chapels erected since the first Marriage Act, and all marriages thereafter to be solemnized in such churches or chapels, it having been customary to solemnize marriages therein since the passing of the said Marriage Act, should be good and valid in law.[m]

Sanction of custom.

In churches built under the provisions of the 1 & 2 Will. IV. c. 38, there is no power given, either to the commissioners or to the bishop, to determine that marriages shall be solemnized therein: and the power to give such authority appears to have been purposely omitted in that act.

But now, any church or chapel, without reference to the

[k] 58 Geo. 3, c. 45, ss 24, 27, 28.
[l] 59 Geo. 3, c. 134, ss. 16, 17.
[m] 6 Geo. 4, c. 92, ss. 1, 2.

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particular act under which it may have been built, and, as it seems, whether built or consecrated before or after the 17th of August, 1836, the time of passing the statute 6 & 7 Will. IV. before mentioned, may be licensed by the bishop for the due solemnization of marriages; for by the 26th section of that act, reciting that it is expedient that provision should be made, under proper restrictions, for relieving the inhabitants of populous districts remote from the parish church, or from any chapel wherein marriages may be lawfully celebrated according to the rites and ceremonies of the Church of England, from the inconvenience to which they may be thereby subjected in the solemnization of their marriages; it is enacted, that, with the consent, under the hand and seal of the patron and incumbent respectively of the church of the parish or district in which may be situated any public chapel, with or without a chapelry thereunto annexed, or any chapel duly licensed for the celebration of divine service according to the rites and ceremonies of the Church of England, or any chapel the minister whereof is duly licensed to officiate therein according to the rites and ceremonies of the Church of England; or without such consent, after two calendar months' notice in writing given by the registrar of the diocese to such patron and incumbent respectively, the bishop of the diocese may, if he shall think it necessary for the due accommodation and convenience of the inhabitants, authorise, by a license under his hand and seal, the solemnization of marriages in any such chapel for persons, one or both of whom is or are residing within a district the limits whereof shall be specified in the bishop's license, and under such provisions as to the amount, appropriation, or apportionment of the dues, and as to other particulars, as to the said bishop may seem fit, and as may be specified in the said license; provided that it shall be lawful for any patron or incumbent who shall refuse or withhold consent to the grant of any such license, to deliver to the bishop, under his or her hand and seal, a statement of the reasons for which such consent shall have been so refused or withholden; and no such license shall be granted by any bishop until he shall have inquired into the matter of such reasons; and every instrument of consent of the patron and incumbent, or, if such consent be refused or withholden, a copy of the notice under the hand of the registrar; and every statement of reasons alleged as aforesaid by the patron or incumbent, with the bishop's adjudication thereupon under his hand and seal, shall be registered in the registry of the diocese; and thenceforth, and until the said license be revoked, marriages solemnized

Bishop may now license *any* church or chapel for the solemnization of marriages.

Manner in which this may be done in each case.

Patron or incumbent refusing consent.

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in such chapel shall be as valid to all intents and purposes as if the same had been solemnized in the parish church, or in any chapel where marriages might heretofore have been legally solemnized.[o]

If the bishop shall authorise the solemnization of marriages in any such chapel as aforesaid, without the consent under the hand and seal of the patron and incumbent respectively, it shall be lawful for them or either of them to appeal, within one calendar month, to the archbishop of the province, who shall hear the same in a summary manner, and shall make such order, confirming, revoking, or varying the license so given, as to him shall seem meet and expedient, which order shall be registered in the registry of the diocese, and shall be conclusive and binding on all parties whatsoever.[p]

Appeal by patron or incumbent to archbishop.

In some conspicuous part in the interior of every such chapel so licensed there is to be placed a notice, in the words, "Marriages may be solemnized in this chapel."[q] But notwithstanding such license, the parties residing within the specified district have their option to be married at the parish church, or at any chapel in which the marriage of them or either of them might previously have been legally solemnized.[r]

Notice to be affixed in every chapel so licensed.

Option given to parties.

Every such license may at any time be revoked, by writing under the hand and seal of the bishop of the diocese, with the consent in writing of the archbishop of the province: and such revocation and consent shall be registered in the registry of the diocese, the registrar whereof shall notify the same in writing to the minister officiating in the chapel; and shall also give public notice thereof by advertisement in some newspaper circulating within the county, and in the London Gazette, and thenceforth the authority to solemnize marriages in such chapel shall cease and determine.[s]

Licenses may be revoked.

A list of all chapels belonging to the Church of England wherein marriage may be lawfully solemnized according to the rites of that church, within the diocese, is to be sent by the registrar of the diocese, annually, within fifteen days after the 1st of January, through the post-office, to the registrar-general of births, deaths and marriages, at his office: such lists are to distinguish what chapels have a parish, chapelry, or other recognised ecclesiastical division annexed to them; and which are chapels licensed by the bishop in pursuance of the provisions we have just mentioned, and to state the district for which each of such

List of licensed chapels to be sent annually to the registrar-general.

[o] 6 & 7 Will. 4, c. 85, s. 26.
[p] Sect. 28.
[q] Sect. 29.
[r] Sect. 31.
[s] Sect. 32.

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chapels is licensed, according to the description thereof in the license; and the registrar-general is to make out and cause to be printed a list of all such chapels, and send a copy to every registrar and superintendent registrar.[t]

Chapels which have been constituted parish churches under 1 & 2 Vict. c. 107.

Where, under the powers of the act 1 & 2 Vict. c. 107, a church or chapel is constituted the parish church of the parish in which the same is situate in the stead of the ancient parish church, all acts of parliament, laws and customs relating to the publishing banns of marriage, and celebration of marriages, are made to apply to such church or chapel in every respect in like manner as to such former parish church.[u]

Second rule. By whom Church of England marriages are to be performed.

2. Marriage according to the forms of the Church of England must be performed by a minister of the Established Church. In the old constitutions of the Church the word priest is always used in speaking of the clergyman by whom marriage is to be solemnized; and the constant form of pleading marriages was, that it was *per presbyterum sacris ordinibus constitutum.*[x] So also it was said by Lord Coke, that a marriage, solemnized by a person in priest's orders, is good, though there was no publication of banns, &c.[y] These expressions would lead us to the supposition that formerly no person, not being in priest's orders, and consequently no deacon, was permitted to perform the marriage ceremony. And in the rubric, in the form of ordination, where the duties appertaining to the office of a deacon are mentioned, nothing is said about the solemnization of matrimony:[z] but Watson, speaking of that rubric says, forasmuch as a deacon is hereby permitted to baptise, catechise, preach, and assist in the administration of the Lord's Supper, so by parity of reason he hath used to solemnize matrimony:[a] and such now seems to be the admitted law and custom of the Church; and that a deacon is as fully authorised as a priest to perform this ceremony.

Clergyman refusing to marry.

If the clergyman whose proper office it would be should refuse to marry persons who apply to him to perform the ceremony, all the necessary preliminaries having been observed, it is doubtful whether the parties refused, or either of them, could maintain an action for damages against him at common law. Lord Denman says he is not prepared to say "that such an action might not be maintained upon the declaration raising a proper complaint of a public officer neglecting his public duty, to the temporal, and, it might

Query, whether action lies against him at common law.

[t] Sect. 34.
[u] 1 & 2 Vict. c. 107, s. 16.
[x] Bacon's Abr. Marriage C.
[y] Co. Litt. 344; Bacon's Abr. ibid.
[z] See rubric in Ordination Service.
[a] Wats. 314.

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be, the very great damage of an individual. Such a neglect of the duty of a clergyman may be actionable, if it be malicious and without probable cause." But the court in that case held, that whatever might be the law generally, the declaration was decidedly bad, as it did not state that the request was made to the clergyman by both parties, nor did it show that the license was in force at the time of the request, nor that two witnesses were ready, nor that the clergyman at the time of the request might have performed the ceremony, not being engaged elsewhere.[b] It may be inferred, therefore, that if such a refusal by a clergyman is actionable, such an action would at any rate be much embarrassed by the technical care necessary in the form of pleading.

But he might be punished in proceeding under Church Discipline Act.

In the above case it appears to have been considered as undoubted that the ecclesiastical court would punish a clergyman for refusing to marry parties who were properly qualified; and a proceeding against a clergyman for such an offence would now, therefore, be under the Church Discipline Act. The canon law, as before observed, directs that no sacrament shall be denied to any one on account of any sum of money, *nor shall matrimony be hindered therefore*.[c] And consequently, although the rubric in the office of matrimony speaks of the fee as to be paid at the time of giving the ring, it is clear that the clergyman could not demand the fee at such time, or refuse to proceed with the ceremony, although this appears to have been doubted.[d]

Persons pretending to be in orders.

If any person, falsely pretending to be in holy orders, shall solemnize matrimony according to the rites of the Church of England, he shall, upon being convicted, be deemed guilty of felony, and be transported for fourteen years.[e]

Third rule. Must be according to all the rules prescribed by the rubric.

3. In speaking of the uniformity of public worship, we have already had occasion to mention the heavy penalties to which any minister is liable who refuses to say the Common Prayer, and minister the sacraments in such order and form as is set forth in the Book of Common Prayer; and in the same place we have also quoted the words of Sir J. Nicholl: "The law," he says, "directs that a clergyman is not to diminish, in any respect, or to add to the prescribed form of worship; uniformity in this respect is one of the leading and distinguishing principles of the Church of England. Nothing is left to the discretion and fancy of the individual; if every minister were to alter,

[b] *Davis* v. *Black*, 1 Queen's Bench, 900.
[c] Langton.
[d] 2 Burn. E. L. 431.
[e] 4 Geo. 4, c. 76, s. 21.

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omit, or add, according to his own taste, uniformity would soon be destroyed."[f] It is evident, therefore, that any minister is acting illegally, and is liable to punishment, who omits any portion of the prescribed form of the marriage service according to his fancy or discretion. It is, nevertheless, an offence which has certainly been very frequently committed, and it was probably for that reason that the first section of the statute 6 & 7 Will. IV. c. 85, expressly enacts that, after the 1st day of March, 1837, *all* the rules prescribed by the rubric concerning the solemnization of marriages shall continue to be duly observed by every person in holy orders of the Church of England, who shall solemnize any marriage in England. If, therefore, any custom might have appeared to sanction a departure from the prescribed form, such custom has been recently repudiated by the legislature, and the clergyman would not only be liable to punishment, but as it seems would be wholly without excuse, who, following his taste or fancy, should now offend in this manner.

Fourth rule. Must be within canonical hours.

4. No minister, upon pain of suspension for three years *ipso facto*, shall celebrate matrimony between any person at any unseasonable times, but only between the hours of eight and twelve in the forenoon.[g] Such is the canon law, and beyond all doubt it was anciently the law of the Church, that marriage was not to be celebrated at particular seasons of the year, which appears to have so continued, at least up to the time of Elizabeth; but such restrictions have long since ceased to exist.[h]

Penalty on clergymen offending against this rule.

It does not very clearly appear whether this regulation as to marriages being celebrated only between the hours of eight and twelve existed as the law of the Church previously to the canons of 1603. But now, by the statute law, a severe penalty is fixed to the offence of solemnizing marriage at any other time; for it is enacted, that any person, knowingly and wilfully solemnizing matrimony at any other time than between the hours of eight and twelve in the forenoon, unless by special license, shall be adjudged guilty of felony, and be transported for fourteen years.[i]

Fifth rule. Proper number of witnesses.

5. Every marriage must be solemnized in the presence of at least two credible witnesses, besides the clergyman celebrating it;[j] and the clergyman would not therefore be justified in performing the ceremony unless that number of witnesses were present.

Non-observance of which of these rules would make void the marriage.

These five requisites must, as we have seen, be observed by the clergyman, but it does not appear that the marriage

[f] Ante "Public Worship." [g] Canon 62. [h] See Burn's E. L. Marriage.
[i] 4 Geo. 4, c. 76, s. 21. [j] Ibid. s. 28.

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itself, if solemnized, would be void for want of any except the two first; for neither the statute 4 Geo. IV. nor the 6 & 7 Will. IV., both of which declare the causes for which marriages shall be void, mention either of these last among those causes.

Marriages to be solemnized in the chancel, and before the Lord's Table.

As to the particular part of the church in which marriages should be solemnized, the safest, and probably the only positive guide is, that custom and long established usage which our laws are careful to respect. Custom has now fully established the solemnization of marriages in the chancel and before the Lord's Table, so that it was expressly said some time since by Sir J. Nicholl, that the use of the chancel belongs to the parishioners for the decent and convenient celebration of the holy communion and for *the solemnization of marriages*. Yet in neither of these cases is there to be found any positive order either in the canon or statute law that they should be celebrated in the chancel. In the order of the communion service, as will afterwards be observed, there is to be found no direction as to the part of the church in which it is to be administered to the communicants; but in the marriage service it is first directed that the parties to be married shall come into the body of the church; and without any direction for their moving, they are at a later part of the ceremony spoken of as kneeling before the Lord's Table. This has appeared perplexing to some who have not considered that at the time when this rubric was compiled, the Lord's Table was probably almost always placed in the body of the church: although it appears by the canon law to have been considered indifferent whether placed in the church or chancel.[k] And the rubric before the communion service speaks of the Lord's Table as standing in the body of the church or of the chancel. The whole rubric in the service for the solemnization of matrimony may be easily understood by reference to this latter circumstance. The direction that the parties to be married should come into the body of the church (not merely into the church), plainly signifies that they should come to the place where the Lord's Table stood; there they are directed to kneel down;[l] and without any direction for their rising, are spoken of as "kneeling before the Lord's Table."

When the Lord's Table became generally, for greater convenience, transferred to the chancel, the place for the solemnization of marriage as well as for administering the communion came to be transferred there also; for it would have been inconvenient, if not impossible, to have trans-

[k] Canon 82.

[l] See the rubric after the giving of the ring.

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ferred the Lord's Table back from the chancel to the body of the church upon every occasion that would have required it. And it was probably very clearly understood that the only important direction intended by the rubric as to place was, that marriages should be solemnized before the Lord's Table.

Registering marriages.

The marriage having been performed, it is the duty of the clergyman to register it, and this he was required to do by the statute 4 Geo. IV. c. 76. It would, however, be of little use to enter now into the provisions of that act for this purpose, for by the statute 6 & 7 Will. IV. c. 86, which provides for the establishment of a general registry, so much of the first-mentioned statute as relates to the registration of marriages is altogether repealed, and the following are the directions and regulations which are now to be observed by the clergyman in registering any marriage which he may solemnize.

Books for registration.

The registrar general is to furnish to every rector, vicar, or curate, of every church or chapel in England, wherein marriages may legally be solemnized, a sufficient number, in duplicate, of marriage register books, printed according to a particular form prescribed by the act, and forms for certified copies thereof.[m]

The cost of all such books and forms is to be borne by the union, parish, or place in and for which the superintendent registrar is appointed, to whom the rector, &c. is directed to deliver one copy of the register, and such cost is to be paid to the superintendent registrar by the guardians, or by the churchwardens and overseers, as the case may be, out of any monies in their hands as such guardians, &c. for the relief of the poor.[n]

Every clergyman, immediately after the office of matrimony has been solemnized by him, is to register, in duplicate, in two of the marriage register books, the several particulars relating to the marriage, according to the form prescribed in the book,[o] and every such entry is to be signed by him, and by the parties married, and by two witnesses, and is to be made in order from the beginning to the end of the book, and the number of the place of entry in each duplicate marriage register book shall be the same.[p]

Copies made by minister.

Every rector, vicar or curate of every such church or chapel shall, in the months of April, July, October and January respectively, make and deliver to the superintendent registrar of the district in which such church or

[m] 6 & 7 Will. 4, c. 86, ss. 17 and 30.
[n] 1 Vict. c. 22, s. 25.
[o] See Appendix.
[p] Sect. 31.

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chapel may be situated, or which may be assigned by the registrar general to such registering officer or secretary, or to some registrar under the superintendence of such superintendent registrar, by whom it is to be forwarded to the superintendent registrar, on durable materials, a true copy, certified by him under his hand, of all the entries of marriage in the register book kept by him since the last certificate, and to contain all the entries made up to that time; and if there shall have been no marriage entered therein since the last certificate, he shall certify the fact under his hand, and shall keep the said marriage register books safely until the same shall be filled: and one copy of every such register book, when filled, shall be delivered to the superintendent registrar of the district in which such church or chapel may be situated, or which shall have been assigned as aforesaid to such registering officer or secretary, and the other copy of every such register book kept by any such rector, vicar, or curate, shall remain in the keeping of such rector, vicar, or curate, and shall be kept by him with the registers of baptisms and burials of the parish or chapelry within which the marriages registered therein shall have been solemnized.[q]

Searches to be allowed.

Every rector, vicar, or curate who shall have the keeping, for the time being, of any such register book, shall at all seasonable times allow searches to be made in it, and shall give a copy, certified under his hand, of any entry or entries in the same.[r]

Fees for.

The fee to the clergyman for every such search, extending over a period of not more than one year, is to be one shilling; and sixpence additional for every additional year; and two shillings and sixpence for every single certificate.[s]

The superintendent registrar to pay to such rector, vicar, or curate, the sum of sixpence for every entry contained in such certified copy, which sum shall be reimbursed to the said superintendent registrar by the guardians or overseers of the union, parish, or place for which he is the superintendent registrar.[t]

Penalty on minister not making the copies, &c.

If such rector, vicar, or curate should neglect so to make out and deliver such certified copies, or the certificate that no marriages have taken place, as the case may be, and after being duly required to deliver them shall refuse or neglect so to do during one calendar month, he is liable for every such offence to forfeit a sum not exceeding ten pounds, to be recovered as after mentioned; but

[q] Sect. 33. [r] Sect. 35. [s] Ibid. [t] 1 Vict. c. 22, s. 27.

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in such case a moiety of the penalty shall not go to the informer, but the whole shall go to the registrar general, or such other person as the commissioner of the treasury shall appoint, for the use of her majesty.[u]

Minister may question the parties.

And for enabling the particulars of the marriage to be correctly entered, it is declared lawful for the clergyman to ask the parties married the several particulars which are by the act required to be registered touching such marriage, and the party who wilfully makes any false answers to the questions touching any of such particulars is declared guilty of perjury.[x]

Clergyman injuring the register *carelessly*.

Any clergyman who shall refuse, or without reasonable cause omit, to register any marriage solemnized by him, or who shall carelessly lose or injure the register book, or allow it to be injured while in his keeping, shall forfeit fifty pounds for every such offence.[y]

Wilfully.

And if he shall wilfully destroy or injure such book, or any part or certified copy thereof, or cause it to be destroyed or injured, or if he shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register book or certified copy thereof, or shall wilfully insert or cause to be inserted in any register book or certified copy thereof, any false entry of any marriage, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any register book, knowing the said register to be false in any part thereof, he shall be guilty of felony.[z]

Correcting erroneous entries.

If, however, the clergyman should discover any error to have been committed in the form or substance of any entry, he may, within one calendar month after discovering such error, in the presence of the parties married, or, in case of their death or absence, in the presence of the superintendent registrar and two other credible witnesses, who shall respectively attest the same, correct the erroneous entry, according to the truth of the case, by entry in the margin without any alteration of the original entry, in which case he must sign the marginal entry, and add the day of the month and year when such correction is made, and must make the like marginal entry, attested in like manner, in the duplicate marriage register book, and also make the like alteration in the certified copy of the register book; or in case such certified copy has been already made, then he must make and deliver in like manner a separate certified copy of the original erroneous

[u] 1 Vict. c. 22, s 28. [x] 6 & 7 Will. 4, c. 86, ss. 40, 41.
[y] Ibid. sect. 42. [z] Sect. 43.

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entry, and of the marginal correction therein made; and if all this be properly done, then he will not be liable to any of the penalties before mentioned.[a]

Recovery of penalties against clergyman.

All the penalties and forfeitures before mentioned which may be incurred by the clergyman under any of the last-mentioned provisions as to registration of marriages, unless otherwise directed, are made recoverable before any two justices of the peace, upon the information and complaint of any person; and if, upon conviction, the fine or forfeiture, with costs, are not forthwith paid, the same may be levied by distress; and for want of distress the offender may be committed, without bail, for one calendar month, unless the fine, with the charges for recovery of the same, be sooner paid,[b] one moiety of the fine to go to the informer, the other to the registrar general or to such person as the lords of the treasury shall appoint, for the use of his majesty.[c]

No distress is to be deemed unlawful, nor is any person making it to be deemed a trespasser, on account of any defect or want of form in the summons, conviction, or warrant of distress, or any irregularity afterwards committed by the party distraining. But persons aggrieved by such irregularity shall recover full satisfaction for the special damages sustained in an action on the case.[d]

Appeal.

An appeal is given in all cases of summary conviction, where the sum adjudged to be paid exceeds five pounds, to the next quarter sessions holden not sooner than twelve days after the day of such conviction.[e]

Notice of appeal, in writing, stating the cause and matter thereof, to be given within three days of such conviction, and seven clear days, at least, before such sessions.[f]

The appellant to remain in custody till the sessions, or enter into a recognizance, with two sufficient sureties, conditioned personally to appear at the sessions and try the appeal, abide the judgment of the court, and pay such costs as shall be awarded.[g]

The sessions to determine the appeal, and make such order therein as to them shall seem meet, with or without costs; if the appeal be dismissed, or the conviction confirmed, they may order the offender to be punished according to the conviction and pay the costs awarded, and may issue process to enforce the judgment.[h]

And no such conviction or adjudication, made on appeal therefrom, shall be quashed for want of form, or be removed, by *certiorari* or otherwise, into any of his majesty's

[a] Sect. 44. [b] Sect. 45. [c] Ibid. [d] Ibid.
[e] Sect. 46. [f] Ibid. [g] Ibid. [h] Ibid.

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superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a valid conviction to sustain the same.[z]

CHAPTER IV.

OF BURIAL, AND OF THE DUTIES OF A MINISTER OF THE ESTABLISHED CHURCH IN RELATION THERETO.

Mode of disposing of the dead.

By far the most ancient account of the mode of disposing of the dead, of which any authentic record has been transmitted to us, is that contained in the twenty-third chapter of the Book of Genesis, and it is that which has been universally practised among Christians, namely, by

By burial.

burial. The words of Abraham on that occasion may perhaps lead to the inference that this mode of disposing of the dead was not at that time an universal custom, for he says, "If it be your mind that I should bury my dead out of my sight;"[a] words which though capable of other explanation, cannot certainly exclude this supposition. Machpelah, in the Arabic language, signifies walled or shut up;[b] and we may, therefore, infer that the most ancient mode of sepulture was in caves or grottoes, walled up, and thus protected from profanation.[c]

By burning.

The earliest authentic records of other nations, which, however, are of a date long subsequent to the above, mention burning as the mode of disposing of the dead; and the practice was undoubtedly both very ancient and widely diffused. The following, on the other hand, are the memorable words of the great Cyrus, as recorded by his biographer, Xenophon; and if they originated in the elegant imagination of the Greek, they are not on that account the less valuable, as showing the opinions which at that age may be supposed to have prevailed either among the Persians or the philosophers of other countries.

Directions by Cyrus as to the disposal of his body.

τὸδ' ἐμὸν σῶμα, ὦ παῖδες, ὅταν τελευτήσω, μήτε ἐν χρυσῷ θῆτε, μήτε ἐν ἀργύρῳ, μήτε ἐν ἄλλῳ μήδενι, ἀλλὰ τῇ γῇ ὡς τάχιστα

[z] Sect. 47. [a] Genesis, xxiii. 8. [b] Mant's Bible.

[c] Tacitus also mentions the Jewish custom of burial, as something different from that of other nations. *Corpora condere quam cremare*, Hist. l. 5, c. 5.

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ἀπόδοτε, τί γὰρ τούτου μακαριώτερον τοῦ γῇ μιχθῆναι, ἢ πάντα μὲν τὰ καλὰ πάνταγε τ' ἀγαθὰ φύει τε καὶ τρέφει.[d]

The above passage is rendered more important by the comment made upon it by Cicero. "Mihi quidem antiquissimum sepulturæ genus id videtur fuisse, quo apud Xenophontem Cyrus utitur."[e] The Jewish records were, of course, unknown to the Romans; but as a different practice prevailed, and for many ages had prevailed at the time when Cicero wrote, it may be presumed that he had some authority, now unknown to us, for the opinion which he here expresses.

Opinion of Cicero.

From the words of Cyrus, or Xenophon, it may be indirectly inferred that some sepulchral chests, or what we call coffins, were at that time in occasional use, where burial was practised, so as to prevent the bodies which were enclosed in them from coming in immediate contact with the earth. It has been thought to be strongly intimated by several passages in Sacred History, that the use of coffins, in our sense of the word, was made among the Jews. But it is almost certain that they were not in use among the two polished nations of antiquity, since in neither of them is there any word which can be synonymous with our word coffin.[f] We have seen that the two most ancient modes of disposing of the remains of the dead recorded by history are by burial and burning; of which burial, among all nations, according to the passage from Cicero above quoted, appears to be the most ancient. The example of the divine founder of our religion, in the disposal of his own person, has established and confirmed this practice among his followers; and accordingly, from the earliest records of their history, the Christians abhorred the way of obsequies by burning. The practice of sepulture has also varied with respect to the places used for that purpose. In ancient times caves were in high request: mere private gardens, or other demesnes of the families, enclosed spaces out of the walls of towns, or by the sides of the roads, and finally, in Christian countries, churches and churchyards, where the deceased could receive the pious wishes of the faithful who resorted thither in the various calls of public worship, and thus the practice generally remains to the present day.[g]

Antiquity of the use of coffins.

Burial always universally adopted among Christians.

Various places used for burial at different times.

The practice of burying within the churches did indeed, though more rarely, obtain before the use of churchyards, but was by authority restrained when churchyards became frequent and appropriated to that use. For among those

Burial in churches, when begun.

[d] Xenophon de Cyri Instit. H.
[e] De Legibus, l. 11, c. 22.
[f] 3 Phill. 348, per Lord Stowell.
[g] 3 Phill. 348, per Lord Stowell.

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canons which seem to have been made before Edward the Confessor, the ninth bears the title, *De non sepeliendo in ecclesiis*, and begins with a confession that such a custom had prevailed, but must be now reformed, and no such liberty allowed for the future, unless the person be a priest, or some holy man, who by the merits of the past life might deserve such a peculiar favour.[h]

The custom afterwards restricted.

At first it was the nave or body of the church that was permitted to be a repository of the dead, and chiefly under the arches by the side of the walls. Langfranc, Archbishop of Canterbury, seems to have been the first who brought up the practice of vaults in chancels, and under the very altars, when he had rebuilt the church of Canterbury, about the year 1075.[i]

Vaults in chancels; when introduced.

More recently the places of sepulture in our larger and more populous towns have been very commonly in cemeteries, or spots of ground consecrated for that purpose, and unconnected with the church or churchyard, and this practice may be said to be increasing daily.

Modern cemeteries.

Such is the brief history of the varied alterations in the mode and places of burial, from which there has[k] arisen a custom so strong and well established, that it is now the common law of this country, that every person may at this day be buried in the churchyard of the parish where he dies.[l]

Persons may be buried in parish where they die.

The canon law principle was "*ubi decimas persolvebat vivus sepeliatur mortuus.*" A stranger and foreigner therefore would, according to that law, have no absolute right to burial in the parish where he died, except such right as arises out of necessity.

Principle of the canon law; restriction to cases of parishioners,

And it has been recently stated in a work of much authority, that the right that a person has to be buried where he dies must be restricted to such as are parishioners at the time.[m] But the authority there referred to will scarcely be found to support the proposition; and it appears that a parishioner dying out of his parish, has a right to be buried where he dies, or, if his relatives wish to remove him, that he has also a right to be buried in the churchyard of his own parish, *ubi decimas persolvebat vivus.*[n]

or *semble*, may be buried where they were parishioners.

Power of opposing burial of parishioner.

And it has been held consequently that information was grantable against a parson opposing the burial of a parish-

[h] Kennett's Par. Ant. 592; 1 Burn's E. L. 256; Gibs. 453.
[i] Kennett's Par. Ant. 593; 1 Burn's E. L.
[k] See words of Lord Stowell in *Gilbert* v. *Buzzard*, post.
[l] Comyns's Dig., Cemetery B.; Degge, p. 1, c. 12.
[m] Roger's E. L. 136; and see post Lord Stowell in *Gilbert* v. *Buzzard*.
[n] See post the case of pauper burials.

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ioner in the churchyard: though as to refusing to read the burial service over the deceased, that was a matter cognizable in the ecclesiastical court.[o] And so far as mere interment is meant, there appears to be no exception whatever from this general right; unless there should be a particular custom for some reasons of health, &c., not to bury in the churchyard, or unless in some instances of individuals, as in the case of one executed for murder, the sentence should, as a part of the punishment, decree otherwise.[p] Formerly those persons were excepted against whom a verdict of *felo de se* had been found, but the exception no longer exists, and indeed the interment of such person elsewhere than in the burial ground of their parish seems prohibited, for it is now provided that they are to be privately interred by direction of the coroner or other officer, in the churchyard, or other burial ground of the parish or place in which the remains of such person might by the law of England be interred, within four hours from the finding of the inquisition, and between the hours of nine and twelve at night.[q]

This right to interment universal.

Burial of those persons against whom a verdict of *felo de se* has been found.

So universal is this right of sepulture, that the common law, as it seems, casts the duty of providing it, and of carrying to the grave the dead body decently covered, upon the person under whose roof the death takes place: for such person cannot keep the body unburied, nor do anything which prevents Christian burial; he cannot therefore cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living; and for the same reason he cannot carry him uncovered to the grave. And therefore, when any pauper dies in any parish house, poor house, or union, as the case may be, that circumstance casts on the parish or union the obligation of burying the body. And so therefore, as it seems, where any death takes place in an hospital, or other establishment of this kind, the obligation of burying is on such establishment. Formerly, it appears to have been a general opinion, that the expenses in such cases should be paid out of the poor rates of the parish to which the deceased belonged, but this has been now declared to be otherwise; and that the poor rate cannot legally be applied to such a purpose.[r] But in the case of burials, under the direction of the guardians or overseers, it has been declared by statute passed since the above decision, that they may charge the

On whom the obligation to provide burial is cast. Paupers.

[o] *R.* v. *Taylor*, Serjeant Hill's MSS., quoted in 1 Burn's E. L. 258.
[p] See 2 & 3 Will. 4, c. 75, s. 16; and 4 & 5 Will. 4, c. 26, s. 1.
[q] 4 Geo. 4, c. 52.
[r] See *Reg.* v. *Stewart*, 12 Ad. & Ell. 773.

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expenses to the poor rate of the parish to which the deceased had been chargeable, or in which he died.[s]

Burials of non-parishioners; matters of favour.

Except in the case of persons dying within the parish, it would appear that all burials of non-parishioners are matters of favour and indulgence by the churchwardens on behalf of the parishioners, and by the incumbent; for, as we have already seen,[t] the right to the churchyard is divided in a particular manner between the parties, and the burial of a stranger would be an invasion upon the rights of each, so that it seems impossible that the consent of the parishioners could render that of the incumbent unnecessary.[u]

In the case of pauper burials, it is declared lawful for the guardians, or where there are no guardians, for the overseers to bury the body of any poor person which may be within their union or parish respectively, charging the expenses as already mentioned, either in the churchyard or burial ground of the parish to which such poor person was chargeable (if he or his relatives shall have so desired, or for any other cause they think it right); or in the churchyard, or other consecrated burial ground belonging to the parish, division, or chapelry in which the death may have occurred.[x]

No custom to bury in a particular part of churchyard.

There can be no custom even for parishioners to bury their dead relations in the churchyard as near their ancestors as possible, nor will a mandamus be granted to bury a corpse in a vault, or in any particular part of a churchyard.[y]

Exception from the general rule by prescription.

In particular cases, however, there may undoubtedly be a prescription to have separate burial in a particular vault in a parish church, as belonging to an ancient messuage, and if one claiming such a prescription was disturbed, he might have an action on the case; nor need he set forth the conditions imposed by an original grant, or that they have been complied with. It would be enough to show the prescriptive right, and to state that the right had been infringed, or a faculty may be shown, of which more hereafter.[z]

Thus, as we have seen, parishioners have a right at common law to be buried in the churchyard of their parish, and a right, and they have an interest, to prohibit strangers from being buried there.[a] But as to the church, which, as we have already observed, is also occasionally a place of

[s] 7 & 8 Vict. c. 101, s. 31, and see post, Fees for Burial.
[t] See title, "Churchyard."
[u] See *Bardin* v. *Calcott*, 1 Hagg. Rep. 17, and *Littlewood* v. *Williams*, 6 Taunt. 280.
[x] 7 & 8 Vict. c. 101, s. 31.
[y] 2 Wils. 28; 1 B. & Ad. 122.
[z] Comyns's Dig. Cemet.; 8 B. & C. 295; Rogers's E. L.
[a] *Littlewood* v. *Williams*, 6 Taunt. 279.

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burial, the right of parishioners to burial does not extend thereto; the practice of burial in the church is observed by the ecclesiastical commissioners to be in many respects injurious, by weakening the fabric of the church, and by its tendency to affect the health of the inhabitants; and no parishioner, much less therefore a stranger, can insist on being buried in any part of the church or chancel, except by leave of the incumbent.[b]

Burial in the church.

Opinion of ecclesiastical commissioners.

It must be observed however here, in the first case, we speak of interments in the church ordinarily and simply, not of cases where a faculty for family vaults is applied for, or already exists, or in cases of prescription.

Exceptions in case of faculty and prescription.

In the simple case then of a person wishing to be buried within the church, the right of consent or refusal is in the incumbent alone, to the exclusion of every other,[c] for neither the churchwardens nor the ordinary himself can grant such license. The reason of this appears to be, that the canon before mentioned (*de non sepeliendo in ecclesiis*) restricted the privilege of burial within the church to priests or holy men, who, by the merits of their past lives, deserved such a peculiar favour; the incumbent, therefore, in his capacity as such, may be supposed to be the person appointed by the law to judge of the fitness or unfitness of the person to be allowed this privilege.[d]

Right of consent or refusal to burials in the church is in the incumbent alone.

Reasons.

But although the incumbent has this privilege, it is exercisable only in individual cases: for he can only grant or refuse license as to the burial of some individual then about to take place, and he cannot by any license from himself bind his successor in any case. But persons buried in churches are now usually buried in vaults made to contain themselves and their families, and as this is a matter of lasting concern to succeeding incumbents and to the parishioners, it can only be done by means of a faculty.

Right of incumbent exercisable only in individual cases.

It must be observed, however, that although a faculty may have been duly obtained, and a vault exist within the church for the burial of a man and his family therein, the right of the incumbent to object to the interment therein of any particular individual would seem to exist notwithstanding. For the reasons which have been already given, why the incumbent is the fit person to give or refuse such license would remain altogether unaffected; and although the incumbent might originally, by withholding his consent to the faculty, have prevented its being obtained, yet he cannot be supposed, by consenting, to have waived for himself and his successors a right which depends on wholly different grounds.

Whether the incumbent can object to the burial of any individual in the church whose family have that right by faculty.

[b] Rogers's E. L. 126.
[c] *Francis* v. *Ley*, Cro. Jac. 367.
[d] Rogers's E. L. 127; 8 B. & C. 295; Degge, 145; Kenn, Par. Ant. 592.

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Supposed opinion of Sir J. Nicholl on this subject.

In a case, however, which we have before mentioned, the judgment of Sir J. Nicholl would rather seem to lead to the conclusion that in the opinion of that learned judge there was at least some doubt whether the incumbent, in such a case, could object to the interment. That judgment was upon the grant of a faculty for the making a vault in the chancel by the lay rector. The vicar was the incumbent, and it was said in the judgment, "*Even if the consent of the vicar to the actual interment of bodies were required*," &c.; and again, "If the vault were to be constructed, and *the vicar's consent to interments therein were necessary*," thus evidently implying a doubt as to the necessity for the consent of the incumbent, and, indeed, he says more distinctly, "it cannot be tolerated that his decision on the moral fitness of the individual to be buried in the chancel should be guided by the amount of the fee paid." [e]

Propriety of the refusal of incumbent may probably be considered in the ecclesiastical court.

If this proposition, which in itself appears most reasonable, be correct, it seems to follow that the incumbent refusing might be compelled to give his reasons for such refusal, consequently that not he alone, but some other authority, as the ecclesiastical court, would be constituted the judge of the fitness or unfitness of the person to have the privilege of being buried in the church.

Interment of persons shipwrecked and cast on shore.

Even with regard to persons shipwrecked, and whose bodies have been cast on shore, miserable outcasts who have no relatives to claim them, and whose remains, perhaps, it may be impossible to recognize, the law has specially provided that decent interment shall be given them; [f] for the churchwardens and overseers in any parish in England, in which any dead body is cast on shore from the sea, shall, upon notice being given them, cause such body to be conveyed to some convenient place, and with all speed cause it to be interred in the parish churchyard or burial ground. The expenses of such interment are not to exceed the sums allowed by the parish for the burial of other persons buried at the expense of the parish; or if such body should be cast on shore in any extra parochial place, such notice is to be given to the headborough, or constable, who shall proceed as before directed in the case of churchwardens, &c. [g]

Reward to persons finding such bodies.

And every person who shall find any such body on the shore, and within six hours give such notice of the fact to the proper parties above mentioned, shall be entitled to five shillings for his trouble; but this is only to be paid to the first person who gives such notice; and no more than

[e] *Rick* v. *Bushnell*, 4 Hagg. 154. [f] 4 Geo. 3, c. 75. [g] Sect. 1.

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five shillings is to be given although there may be more than one body;[h] and as a reward is offered for persons properly giving such notice, so is there a punishment provided for neglecting so to do, for all persons finding such bodies on the shore, and neglecting within six hours after to give or leave such notice, shall forfeit five pounds,[i] and every churchwarden, constable, &c. as the case may be, neglecting to remove such bodies from the shore, prior to interment, for twelve hours after notice given or left in writing at their abode, or to perform the other duties by the act required of them, shall forfeit for each offence five pounds.[j]

Penalty on not giving notice when the body is found.

Parish officers neglecting to remove bodies.

The act, of part of which the above is an analysis, contains several other provisions not important for our present purpose. But the most important part of the act, as concerns the clergy, is, that not only is sepulture enjoined, but the office of burial is also to be performed in such cases, for every minister, parish clerk and sexton, shall in these cases perform the duties customary in other funerals, and admit the body to be buried in the parish burial ground, receiving the like fees as in cases of burial at the expense of the parish,[k] so that in every such case the minister is to presume that the body thus cast upon the shore is that of one properly baptised, and is to act accordingly. And this, as it seems, in all cases, notwithstanding circumstances of colour, country, &c. might lead to an opposite conclusion.

In these cases the office of burial is to be performed as in the usual manner.

The right to interment, therefore, is general, every person, according to the circumstances, having a right to sepulture, either in the church, or churchyard, or other burial place attached or belonging thereto: but the mode of interment, and particular spot or part of the burial ground in which each person is to be buried, it is for the parish, represented by the churchwardens, to determine;[l] and though the right of sepulture is a common law right, the mode of burial is the subject of ecclesiastical cognizance alone, upon which subject it was said by Abbott, C. J. "If a clergyman should absolutely refuse to bury the body of a deceased person brought to him for interment in the usual way, I am by no means prepared to say that this court would not grant a *mandamus* to compel him to bury the body; but this would be acting in aid of the ecclesiastical court."[m]

Mode of burial.

Incumbent probably compelled by *mandamus* to bury in the usual mode.

The mode in which the mortal remains are to be de-

[h] Sect. 3. [i] Sect. 4. [j] Sect. 7.
[k] Sect. 2. But as to any burials at the expense of the parish, see *ante*.
[l] See *ante*. [m] *R.* v. *Coleridge and others*, 2 B. & A. 806.

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posited in the grave is a subject which, in populous parishes, may be of great concern to the parishioners, but of which Lord Stowell observes, "I do not find any positive rule of law or religion that prescribes." Taking this to have been the case prior to the time when the judgment in which these words occur was delivered, the principles contained in that judgment may be considered, since that time, as entirely regulating the law on this subject. It may not, therefore, be less useful than interesting to insert here, as the present state of the law, the able and lucid language of that decision.[n] In that case the body of the deceased had been deposited in an *iron coffin*, and due notice had been given of the intended interment, but the churchwardens having previously signified to the relations of the deceased that the parish would not permit an iron coffin to be deposited in their churchyard, prevented the burial from taking place on account of the imperishable nature of iron coffins, which, in so populous a parish as that of St. Andrew's, Holborn, would soon render the churchyard useless for its purposes. A suit was brought in the ecclesiastical court by a relative of the deceased against the churchwardens, in which the right of the parish to prevent this mode of interment was, in fact, the sole question.

Opinion of Lord Stowell.

The present state of the law as to the mode of burial to be collected from the words of Lord Stowell.

After some remarks upon the case, Lord Stowell says,[o] "that a body be carried to the grave in a state of naked exposure would be a real offence to the living, as well as an apparent indignity to the dead. Some coverings have been deemed necessary in all civilized and christian countries, but chests containing the bodies, and descending into the grave along with them, and there remaining in decay, do not plead the same degree of necessity, nor the same universal use. In the western part of Europe, the use of sepulchral chests has been pretty general. An attempt was made, in our time, by an European sovereign, to abolish their use in his Italian dominions, much commended by some philosophers, on the physical ground that the dissolution of bodies would be accelerated, and the virulence of the fermentation disarmed, by the speedy absorption of all noxious particles into the surrounding soil. Whatever might be the truth of the theory, the measure was enforced by regulations prescribing that bodies of every age and of both sexes of all ranks and

History of the mode of interment.

[n] *Gilbert* v. *Buzzard*, 3 Phill. 348.

[o] The beautiful language, extensive learning, and generally useful applicability of this judgment, appear to be a sufficient excuse for the length at which it is here inserted.

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conditions, and of all species of mortal disease, and every form of death, however hideous and loathsome, should be nightly tumbled, naked and in the state they died, at the sound of a bell, into a night cart, and thence carried to a pit, beyond the city walls, there to rot in one mass of undistinguished putrefaction. This system was so strongly encountered by the established habits, as well as by the natural feelings of a highly-civilized and polished people, that it was deemed advisable, at no great distance of time, to bury the edict itself by a total revocation. In the Southern American establishments of the European nations, coffins do not appear to be used. In our country the use of coffins is extremely ancient. They are found of great apparent antiquity, of various forms, and of various materials; of wood, of stones, of metals, of marble, and even of glass. "Coffins," says Dr. Johnson, "are made of wood and various other matters." From the original expense of some of the materials or labour necessary for the preparation of them for this use, or for both, it is evident that several of them must have been occupied by persons who had filled the loftiest stations of life. In modern practice, chests or coffins of wood or lead, or both, are commonly used for persons who can afford to pay for them. For persons of abject poverty, whom the civil law distinguishes by the title of the *miserabiliter egeni*, what is called a *shell* is used, and which I understand to be an imperfect coffin, and in very populous parishes is used successively for different individuals, unless charity, public or private, supplies them with a better. Persons dying at sea are, I believe, usually committed to the deep in their bedclothes and hammock, but I am not aware that any of these are nominally and directly required. A statute has required that the funeral vestment shall be made of wool; and coffins must, by the same statute, be lined with wool, but the use of it is not enjoined. I observe that in the funeral service of the Church of England there is no mention (and indeed, as I should rather collect, a studied avoidance of the mention) of coffins. It is, throughout the whole of that service, the *corpse* or the *body*. The officiating priest is to meet the *corpse* at the gate of the churchyard; at certain parts of the service, dust is to be thrown, not upon the *coffin*, but upon the *body;* certain parts of the service are to be recited whilst the *corpse* is making ready to be put into the grave. I observe, likewise, that in old tables of parish fees a distinction is stated between coffined funerals and uncoffined funerals in point of payment. There is one of 1627,

In our own country.

Persons dying at sea.

The burial service.

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quoted by Sir Henry Spelman in his *Tract de Sepulturâ*, where a certain sum is charged for coffined burials, and half the same sum for uncoffined burials, and expressly under those general heads of coffined and uncoffined funerals, from whence I draw this conclusion of fact, that uncoffined funerals were, at that time, by no means so unfrequent as not to require a particular notice and provision.

Uncoffined funerals formerly not unfrequent.

"The argument, therefore, that rests the right of admission for particular coffins upon the naked right of the parishioner to be buried in his churchyard, seems rather to stop short of what is requisite to be proved, viz. the right of being buried in a large chest or trunk of any material, metallic or other, that his executors may think fit. The law to be found in many of our authoritative text writers certainly says that a parishioner has a right to be buried in his own parish church-yard;[p] but it is not quite so easy to find the rule in those authorities that gives him the right of burying a large chest or trunk along with himself. This is no part of his original abstract right, nor is it necessarily involved in it. That right, strictly taken, is, to be returned to his parent earth for dissolution, and to be carried there for that purpose in a decent and inoffensive manner; when those purposes are answered, his rights are perhaps satisfied, in the strict sense in which *his claims in the nature of absolute rights* can be supposed to extend. At the same time it is not to be denied that very natural and laudable feelings prompt to something beyond this, to the continuation of the frame of the body beyond its immediate consignment to the grave; and an indulgence of such feelings very naturally engrafts itself upon the original rights, so as to appear inseparably connected with them in countries where the practice of it is habitually indulged. For, however men may feel, or affect to feel, an indifference about the fate of their own mortal remains, few have firmness, or rather hardness of mind, sufficient to contemplate without pain the total and immediate extinction of the remains of those who were justly dear to them in life.

Meaning and limit of the right of parishioner to be buried in his own parish church-yard.

"It is particularly, I presume, with a view to prevent spoliations of the dead, that the use of coffins in question is pressed in the present application to the court. The objection is to the metal of which the coffin is composed, the metal of iron; and I must say, that knowing no rule of law that prescribes coffins, and certainly none that prescribes coffins of wood exclusively, and knowing that modern and frequent usage admits coffins of lead, a metal

[p] See ante; the right appears not confined to parishioners only.

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of a much more indestructible nature than iron, I find a difficulty in pronouncing that the use of this latter metal is clearly and universally unlawful in the structure of coffins, and that coffins so composed are inadmissible upon any terms whatever. These coffins, being composed of thin laminæ, occupy, I presume, as it is alleged, rather less space than those of wood itself. There is then no objection on that ground; and the objection, that they may be magnified to any inconvenient size, seems to apply to coffins constructed of this substance no more than to those of any other. But the claim on the part of these coffins is (which is quarrelled with, though not distinctly avowed), that they shall be admitted on the same terms of pecuniary payment as the ordinary wood. This claim cannot, I think, be reasonably maintained but under the support of one or other of these propositions, either that there is no difference in the duration of the coffin of wood and coffin of iron, or that the difference of duration, be it what it may, ought to make no difference in the terms of admission."

Iron coffins are not universally unlawful.

After mentioning the opinion of the court, that iron coffins might be much more durable than those of wood, Lord Stowell continues, "It being assumed that the court is justified in holding this opinion upon the fact of comparative duration, the pretension of these coffins to be admitted on equal terms must resort to the other proposition, which declares that the difference of duration ought to make no difference in the terms of admission. Accordingly it has been argued, that the ground once given to the interment of a body is appropriated for ever to that body; that it is not only the *domus ultima*, but the *domus æterna*, of that tenant who is never to be disturbed, be the condition of this tenant himself what it may. It is his for ever; and the insertion of any other body into that space, at any other time, however distant, is an unwarrantable intrusion. If these positions be true, the question of comparative duration sinks into utter insignificance.

"In support of them, it seems to be assumed that the tenant himself is imperishable; for surely there cannot be an inextinguishable title, a perpetuity of possession, belonging to a perishable thing, but obstructed in a portion of it by public authority. The fact is, that *man*, and *for ever*, are terms quite incompatible in any state of his existence, dead or alive, in this world. The time must come when his posthumous remains must mingle with and compose a part of the soil in which they have been deposited. Precious embalments and splendid monuments may preserve for centuries the remains of those who have filled the

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more commanding stations of human life; but the common lot of mankind furnishes them with no such means of conservation. With reference to men, the *domus æterna* is a mere flourish of rhetoric. The process of nature will resolve them into an intimate mixture with their kindred earth, and will furnish a place of repose for other occupants of the grave in succession. It is objected, that no precise time can be fixed at which the mortal remains, and even the chests which contain them, shall undergo the complete process of dissolution; and it certainly cannot, being dependent upon circumstances that differ, upon difference of soils and exposure, of climate and seasons: but observation can ascertain it sufficiently for practical use. The experience of not many years is required to furnish a certainty sufficient for such purposes. Founded on these facts and considerations, the legal doctrine certainly is, and remains unaffected, that the common cemetery is not *res unius ætatis*, the exclusive property of one generation now departed; but is likewise the common property of the living, and of generations yet unborn, and subject only to temporary appropriation. There exists a right of succession in the whole, a right which can only be lawfully obstructed in a portion of it by public authority, that of the ecclesiastical magistrate, who gives occasionally an exclusive title in a part of the public cemetery to the succession of a single family, or to an individual who has a claim to such a distinction; but he does not do that without just consideration of its expediency, and a due attention to the objections of those who oppose such an alienation from the common use. Even a brick grave, without such authority, is an aggression upon the common freehold interest, and carries the pretensions of the dead to an extent that violates the just rights of the living.

The churchyard or common cemetery is not *res unius ætatis*, nor the exclusive property of one generation.

Granting faculty for burial in church-yard discretionary, and discretion to be carefully exercised.

"If this view of the matter be just, all contrivances that, whether intentionally or not, prolong the time of dissolution beyond the period at which common local usage has fixed it, are acts of injustice, unless compensated for in one way or other. In country parishes, where the population is small, and the cemeteries are large, it is a matter less worthy of consideration. More can be spared, and less is wanting. But in populous parishes, in large and crowded cities, the exclusive possession is unavoidably limited; for, unless limited, evils of formidable magnitude would take place. Churchyards cannot be made commensurate to a large and increasing population: the period of decay and dissolution does not arrive fast enough in the accustomed mode of depositing bodies in the earth, to evacuate the

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ground for the use of succeeding claimants. New cemeteries are to be purchased at an enormous expense, and the whole environs of the metropolis would be surrounded by a circumvallation of churchyards.

"If, therefore, these iron coffins are to bring an additional charge upon parishes, they ought to bring with them a proportionate compensation; upon all common principles of estimated value, one must pay for the longer lease which you actually take of the ground. If you wish to protect your deceased relative by additional security, which will press upon the convenience of the parish, we do not blame the purpose, nor reject the measure; but it is you and not the parish who must pay for that purpose. It remains only that I should direct the parish to exhibit a table of burial fees for the consideration of the ordinary. Patent rights, and on which it seems these coffins are constructed, must be held by the same tenure as all other rights, *ita utere tuo ut alienum ne lædas.* They must not infringe upon rights more ancient, more public, and such as this court is peculiarly bound to protect." After some further time spent in considering this matter, the case ended by Lord Stowell signing a table of fees for burial to be used in the parish in question; which table has been added in the Appendix, as it is presumed that it may prove very convenient as a general guide.[q]

Iron coffins should pay an additional fee.

Table of fees signed by Lord Stowell.

The present state of the law, therefore, as deduced from the above case is, that the burial in iron coffins is certainly not unlawful, and that the use of them is not prohibited; that they stand upon the same grounds as leaden coffins, or those made of any other metal; but that those who wish to use them, must pay for that privilege. The increased fee to be demanded for them to be fixed in the first instance by the parish, but subject to the revision of the ecclesiastical court upon appeal. As to the application of the money so paid, that, as it seems, is to be decided by the parish; and to whatever parties and in whatever proportions the usual fees for interment have been paid, to those same parties and in the same proportions, it is presumed, that the increased fees would also be payable: at any rate, as observed by Lord Stowell, the party disputing the amount charged to him for such burial would have no right to complain of its application, or indeed to look into that question, or to quarrel with the public uses to which it may have been applied by the parish.

Metal coffins not unlawful.

Additional fee for their use; by whom to be fixed.

To whom to be paid.

Formerly, as observed Lord Stowell, the use of shrouds, made of woollen, was enforced by statute, for the en-

Burial in woollen shrouds

[q] See Appendix.

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not now enforced.

couragement of the woollen manufacturer; but those acts have been since repealed.[r]

Hitherto, we have spoken principally of the universal right to interment, provided the mode be not objected to; there is a further right, which is not equally universal, and which we hitherto noticed only incidentally, viz. to have the burial service performed over the body, a subject which more peculiarly concerns the clergy.

The burial service.

Minister not to refuse to perform generally.

No minister shall refuse or delay to bury any corpse that is brought to the churchyard, convenient warning being given him thereof beforehand, as prescribed by the Book of Common Prayer; and if he shall refuse to do so, except the party deceased were pronounced excommunicate *majori excommunicatione*, for some grievous and notorious crime, and no person able to testify of his repentance, he shall be suspended by the bishop of his diocese from his ministry for the space of three months.[s]

Penalty for refusal.

The proceeding in such a case, being for a breach of the laws ecclesiastical, would be under the Church Discipline Act before mentioned.[t] It is also said that an information would be granted in such a case by the Court of Queen's Bench.[u]

And it would appear that the clergyman is bound to read the burial service over the body brought to be interred, whether it is desired or objected to by the relatives of the deceased; for the statute respecting the burial of dissenters in Ireland clearly supposes this to be the law, it being there declared that it shall not be necessary for the officiating minister of any church in Ireland to celebrate the burial service as by law established at the interment of any person not being of the Established Church of Ireland, unless by particular desire.[x]

Burial of dissenters in Ireland.

And with regard to the burial of dissenters in Ireland, generally it is enacted, that clergymen may grant permission to ministers of other churches and congregations than of the Church of Ireland to perform the burial service over the bodies of persons of their congregations in the churchyard of the parish; such permission must be in writing, and express the time appointed for the burial.[y]

Exceptions to the general rule.

Although the canon only mentions the above exception to the rule, yet two others are mentioned in the rubric, which notes that the office of burial is not to be used for any that die unbaptised, excommunicate, or who have laid violent hands on themselves.[z] Of the first of these excep-

[r] 54 Geo. 3, c. 103. [s] Canon 68. [t] Vide ante, chapt.
[u] Rogers's E. L. 132. [x] 5 Geo. 4, c. 25, s. 4. [y] Ibid.
[z] Office of Burial, Book of Common Prayer.

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tions, we have already spoken fully under the head of Baptisms. It need only be repeated here that the clergyman cannot constitute himself a judge of what is or what is not baptism, because that is determined by the law, which he is bound to obey; and that no person is to be considered unbaptised, so as to be refused Christian burial, who has been baptised according to the essentials of baptisms already defined,[a] by whomsoever, whether priest or layman, that ceremony has been performed; and that a clergyman, refusing to bury one who has been baptised according to those essentials, is fully liable to the penalty before mentioned.

Who are to be considered as unbaptised for this purpose.

Of the second exception, it is to be observed, that the meaning of the rubric in this respect seems to be explained by the canon, which says, that no person shall refuse to bury, &c. in such form as prescribed by the Book of Common Prayer, unless the party deceased were *denounced* excommunicated *majori excommunicatione* for some grievous and notorious crime, and no person able to testify of his repentance.[b] It is clear, therefore, that those cases in which the canon law declares persons *ipso facto* excommunicate, were never contemplated by the words of the rubric; and both before and since the Reformation, where evidence appeared to the bishop of the repentance of the persons excommunicate, commissions have been granted, not only to bury them, but in some cases to absolve them, in order to Christian burial.[c]

Who are to be considered as excommunicate.

The last of these exceptions is to be taken in its restricted sense. Idiots, lunatics, and persons of insane mind, not being deemed responsible for their acts, are not to be understood thereby;[d] but those only who, having wilfully destroyed themselves, are supposed to have died in the commission of a mortal sin. Of the state of mind of those who die by their own hands the coroner's jury are the proper judges; and as the law in reference to other matters considers those only as having laid violent hands on themselves, upon whom a verdict of *felo-de-se* has been returned by such a jury, it cannot be supposed that the minister would be permitted to exercise his own judgment in such a matter. The first ecclesiastical rule as to this matter is the 34th canon of the first council of Braga, A. D. 563, which forbids any burial service for those *qui violenter sibi ipsis inferunt mortem*. The older commentaries on which appear to have understood this with the limitation, if they do it voluntarily, and by instigation of the devil; and this

Who are to be considered as having laid violent hands on themselves.

Rule of the old ecclesiastical law.

[a] Vide ante, "Baptisms."
[b] Canon 68.
[c] Gibs. 450.
[d] 1 Burn's E. L.

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may be considered to have been the old ecclesiastical law prior to the rubric.[e]

Opinion of Dr. Burn.

We should not, therefore, as Dr. Burn observes, without necessity, understand our own rubric to be so much more severe than the preceding constitutions, as to place mad people in the same rank with excommunicate and unbaptised persons, and punish a poor creature for what in him, indeed, was no crime; and he further adds, the proper judges, whether persons who died by their own hands were out of their senses, are, doubtless, the coroner's jury. The minister of the parish hath no authority to be present at viewing the body, or to summon or examine witnesses. And therefore he is neither entitled nor able to judge in the affair, but may well acquiesce in the public determination, without making any private inquiry. Indeed, were he to make one, the opinion which he might form from thence could usually be grounded only on common discourse and bare assertion; and it cannot be justifiable to act upon these in contradiction to the decision of a jury, after hearing witnesses upon oath. And though there may be reason to suppose that the coroner's jury are frequently favourable in their judgment, in consideration of the circumstances of the deceased's family with respect to the forfeiture, and their verdict is in its own nature traversable; yet the burial may not be delayed until that matter upon trial shall finally be determined; but on acquittal of the crime of self-murder by the coroner's jury, the body in that case not being demanded by the law, it seemeth that a clergyman may and ought to admit that body to Christian burial.[f]

Probable state of the law on this subject.

We have entered into this subject more fully, because, notwithstanding the authority here quoted, the strict letter of the rubric would seem to require a different practice; and no case appears ever to have occurred, in which a clergyman, who has refused to bury the corpse of one who has committed suicide in insanity, has been punished by the ecclesiastical law. The uniform practice, however, so far as it has been able to be ascertained, is in accordance with the reasoning and opinion of Dr. Burn; and it must be doubtful whether a departure from a custom of such acknowledged propriety would not be visited with ecclesiastical punishment.

Other causes formerly for refusing burial.

Anciently there were other causes for refusing Christian burial, as for heretics, persons not receiving the holy sacrament once in the year—persons killed in duels, tilts, and

[e] But see Wheatley on the Common Prayer. [f] 1 Burn's E. L. 267.

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tournaments; but the rubric having mentioned three causes of refusal only, all other prohibitions seem no longer to exist.[f]

The service as directed by the rubric.

It is remarkable that the rubric gives a very general direction only in the order for the burial of the dead; for it directs that the priest and clerk's meeting the corpse at the entrance of the church yard, and going before it *either into the church or towards the grave,* &c.; which, if it stood alone, might probably be explained by the circumstance that burial might be in the church or in the churchyard; but it is evident from the order of the service, that this explanation would be insufficient; for there is a considerable portion of the service which is to be read after the corpse has been carried into the church, and before they come to the grave: yet there is no positive direction that the corpse must be taken into the church. It would seem, therefore, that it was intended to leave this matter at the discretion of the minister, to be exercised by him according to his knowledge of the life and habits of the deceased; but, practically, this apparent discretionary power in the minister has given rise to a great scandal; and the discretion of the minister has, in many parishes, been guided by the amount of the fee paid: or rather has been made the means of extorting more than the customary fee for burial: and a different order of the burial service is consequently used in many parishes for the wealthy and for the indigent.

Fees for interment and office of burial.

No constitution or canon, ancient or modern, fixed or pretended to fix any fee for interment, or for the office of burial; on the contrary, the constitution of Langton says, we do firmly enjoin that burial shall not be denied to any one, upon the account of any sum of money. And here it may be observed, that although the canon law might prohibit ministers from taking any fee, it does not follow that it could enforce upon the laity the payment of one.

Burial not to be denied on account of the fee.

Fees may be payable by custom.

But though fees are not due of common right, it seems to be now clearly established, that they may be payable by custom; and originally all such customary fees seem to have been payable for the interment, rather than for the performance of the burial service; but, as in the former case, the fee, or a part of it, may have been payable to the clergyman, as in the latter case, the question is not easy to be determined.

At present it may be laid down that the payment of all such fees, and also the application of them when paid, is regulated by, and entirely dependent on, the custom of

[f] Burn's E. L. 267.

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each particular parish, and is, therefore, by no means necessarily to be made to the minister; as would be the case of a fee paid for the office of burial. In some places it is payable to the incumbent, in others to the churchwardens, and in some others to the incumbent and churchwardens in certain proportions, and in some places, as in many of the parishes about London, the churchwardens not only have the fee for interments in the churchyard, but for those in the church also, the incumbent having the fee for interments in the chancel only;[g] and the payment of those customary fees has been recognised in several statutes, and especially in a case in the Common Pleas in 1815, in which it was said by C. J. Gibbs—the supposed right is to a fee on burial: at common law the churchwardens have no such right whatever. It may exist by custom, but the custom must be immemorial and invariable.[h] So that in a case where such fees were alleged to be payable out of the poor rates, it was said that this disproved their ancient origin; and that it could not be an immemorial custom.[i]

Variously paid and applied.

In and about London.

Custom must be immemorial and invariable.

If there were no question as to the existence of the custom, the ecclesiastical court would have jurisdiction to enforce the payment of the fee; and there would be no ground for a prohibition: but in a recent suit for fees, under such circumstances, in the ecclesiastical court, Dr. Lushington says: "The whole subject is not without difficulty; for it is admitted that no such suit has been brought for a hundred years last past; and I can find nothing in the books as to who are liable for these fees; whether the legal personal representatives of the deceased or any one else."[k] And where the payment of fees for burial was established by, and rested on, the authority of a local act of parliament, it was doubted by Dr. Lushington whether the ecclesiastical court had any power to enforce the payment of them, or whether its jurisdiction was not confined to ancient and customary fees only. And as the act had directed the vestrymen to settle and fix a table of fees for burial, which they had not done, he intimated his opinion that they might be compelled to do so by mandamus.[l]

May be enforced by the ecclesiastical court.

Supposed limit of its jurisdiction.

The proportion of fees for burial, whether of parishioners or non-parishioners, must therefore depend entirely upon the usage and custom of each parish respectively; and the usual amount of reasonable difference in the fees in either

And is triable at common law.

[g] 2 Shower, 184. [h] *Littlewood* v. *Williams*, 6 Taunt. 281.
[i] *Spry* v. *Guardians of Marylebone*, 2 Curt. 11.
[k] Ibid.; and see 3 Black. Com. 63, c. 7. [l] Ibid.

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of such cases will best appear by reference to the table signed by Lord Stowell,[m] but, as in the case of all customs, it must be a reasonable custom; and whether there be such a custom or not would be only triable at common law. And if it were the custom to bury non-parishioners in the churchyard it would therefore appear that the incumbent would not be allowed to charge an unreasonable fee. And so, although in every case where a license is necessary, (as where application is made to the rector for leave to bury in the church,) it has been said that the person giving the license may stand upon his own price,[n] this proposition seems very doubtful, and, indeed, it is directly opposed to what was said by Sir J. Nicholl in the case of *Rich* v. *Bushnell*, before mentioned.[o]

Demand of a fee by the clergyman of a parish in which a person died but was not buried, illegal.

In an old case, it appears to have been attempted to carry the enforcing of a customary fee so far, that where a stranger had died in a parish, in which, if she had been buried, a fee would have been payable, but she had been removed out of that parish for interment; the rector of that parish nevertheless demanded the fee, and libelled against the husband of the deceased in the ecclesiastical court. But a prohibition was granted; for it was said that such a custom was against reason; that he who is no parishioner, but may pass through the parish, or lie in an inn for a night, should be forced to be buried there, or pay as if he were.[p]

Opinion of Gibson on this subject.

It is in observing upon this case that Gibson says,[q] a fee for burial belongs to the minister of the parish in which the party deceased heard divine service, and received sacraments, wheresoever the corpse be buried. And this, he observes, is agreeable to the rule of the canon law, which says, that every one, after the manner of the patriarchs, shall be buried in the sepulchre of his fathers: nevertheless, that if any one desires to be buried elsewhere, the same shall not be hindered, provided that the accustomed fee be paid to the minister of the parish where he died, or at least a third part of what shall be given to the place where he shall be buried. For the understanding of which it is to be noted, that anciently all persons in their wills made a special oblation or bequest to the church at which they were to be interred; and the people in those days depending much upon the prayers of the living for the good of their souls after death, those of better condition coveted oftentimes to be buried in religious houses, with a view to greater assistances which they hoped to receive from the

[m] See the table in Appendix. [n] 1 Salk. 334; 1 Hagg. Cons. 211.
[o] Vide ante. [p] *Topsall* v. *Ferrers*, 15 Jac.; Hobs. 175. [q] Gibs. 452.

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solemn and constant devotions there: also, where the oblations were like to be plentiful, the religious were led by that prospect to desire and promote it. By which means parochial ministers would have been deprived of what belonged of common right to them, and to no other; if the laws which indulged the superstitious conceit of being buried in religious houses had not at the same time provided for the ancient parochial rights which sometimes was the third, sometimes the fourth part (according to the customs of different places) of what was given to the religious houses, the laws probably presuming that the oblations to those houses would be much larger than what was usually given to the parochial minister. And this was called the canonical portion; and the oblation grew by custom into a fixed right of the parish minister. And hence it is, that in dispensations for burying elsewhere, reservations have been made of the rights of those churches where the parties die.[r]

Not of general application.

What is here said by Gibson, and which is quoted in Dr. Burn's work, may be true in some particular cases, but is by no means universally correct, for, as already mentioned, the payment of such fees is entirely matter of custom in each particular parish, and before any such fee could be enforced, it might be inquired of in the common law courts, first, whether such a custom existed, and secondly, if it did exist, whether it was a reasonable custom; or the second inquiry might be considered as included in the first.

In particular cases, parishes may commence a custom of imposing fees for interment. *Sed quære.*

Independently, however, of any ancient and immemorial custom, it has been said that, in populous parishes, where funerals are very frequent and the expense of keeping churchyards in orderly condition great, and where the expense of purchasing new ones, where the old ones become surcharged, is extremely oppressive, it is not to be deemed unreasonable that the actual use should contribute when it is called for; that is to say, that a parish so situated could commence a custom of this nature, and impose a rate to be paid for each interment. But in such cases parishes would not be left to carve for themselves; the rates must be submitted to the examination and approval of the ordinary.[s]

But such fees must have the sanction of the ordinary.

The above authority questioned. Probable restricted meaning.

But the authority for what is here said appears to have been doubted in a recent case by Dr. Lushington, who asks "Could this approval by the existing Chancellor bestow on these fees a legal character, so as to make them recoverable here? I think the whole of the authorities

[r] Gibs. 452.

[s] Per Lord Stowell in *Gilbert* v. *Buzzard*, ante.

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show that no such power exists—I mean a power in the chancellor of a diocese to create new fees for common burial. How far such an authority could constitute new fees in cases not of common burial is a question I am not called upon to discuss. All I say is, that a chancellor cannot, by his own authority, create a new fee for common burial."[t] And to what is here said by Dr. Lushington, it may be added, that as burial is a common law right, it would be strange if it could be limited or restricted by the ordinary, the ecclesiastical judge, or the particular parish, and probably what was said by Lord Stowell must be taken as an authority only that fees might be imposed on the burial of parties dying out of the parish, and where, consequently, there would be no common law right of burial.

Fees on pauper funerals.

In the case of pauper burials it has now been enacted, that in all cases of burial under the directions of the guardians and overseers, the fees payable by the custom of the place where the burial may take place, or under the provisions of any act of parliament, shall be paid out of the poor rates for the burial of each such body, to the person or persons who, by such custom or such act, may be entitled to receive them.[u]

By the statute 6 & 7 Will. IV. c. 86, it is expressly provided, that nothing therein contained shall affect the right of any officiating minister to receive the fees then usually paid for the performance or registration of any baptism, *burial*, or marriage. The general provisions respecting the registration of burials have been already mentioned under the head of baptisms, in so far as the registration of them is directed by the statute 52 Geo. III. c. 146. But in the case of burials, as of baptisms, although the general provisions of that statute remain unaffected, yet some additional provisions have been made by the stat. 6 & 7 Will. IV. c. 86, for it has been made unlawful for any clergyman to perform the funeral service for the burial of any dead body, unless he has received a certificate either from the registrar or the coroner, or unless within seven days afterwards he gives notice thereof to the registrar. The words of the section are as follows:—"That every registrar, immediately upon registering any death, or as soon after as he shall be required to do so, shall, without fee or reward, deliver to the undertaker or other person having charge of the ground, a certificate under his hand, according to a prescribed form,[x] that such death has been duly registered, and such certificate shall be delivered by such undertaker

Registering burials.

Clergyman not to bury without certificate.

[t] *Spry* v. *Guardians of Marylebone*, 2 Curt. 11. [u] 7 & 8 Vict. c. 101, s. 31.
[x] See Appendix.

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or other person to the minister or officiating person who shall be required to bury or perform any religious service for the burial of the dead body; and if any dead body shall be buried for which no certificate shall have been so delivered, the person who shall bury, or perform any funeral or religious service for the burial, shall forthwith give notice thereof to the registrar: provided that the coroner, upon holding any inquest, may order the body to be buried, if he shall think fit, before registry of the death, and shall in such case give a certificate of his order, in writing under his hand, according to a prescribed form,[y] to such undertaker or other person having charge of the funeral, which shall be delivered as aforesaid; and every person who shall bury, or perform any funeral or any religious service for the burial of any dead body for which no certificate shall have been duly made and delivered as aforesaid, either by the registrar or coroner, and who shall not, *within seven days*, give notice thereof to the registrar, shall forfeit and pay any sum not exceeding ten pounds for every such offence.[z]

unless he give notice of his having done so.

Penalty for neglect of these directions.

It has been observed that there is no prescribed form of notice to be given by the clergyman who has performed the service without a certificate, and that a verbal one might therefore be sufficient; but a written one would appear safer and more proper.

CHAPTER V.

OF THE ADMINISTRATION OF THE LORD'S SUPPER.

THE ecclesiastical authorities of earlier times were duly solicitous to have the sacred rite of the Lord's Supper administered frequently, and to as large a number of communicants as could be obtained, without admitting those who were unfitted to be received by crimes of a heinous nature, notorious evil living, oppression of their neighbours, or reciprocally cherished malice or hatred. To attain which purposes the following are the directions of the rubric.

Rubrical directions.

Number of communicants.

First, as to the number of communicants. There shall be no celebration of the Lord's Supper, except there be a convenient number to communicate with the priest, according to his discretion. And if there be not above twenty persons in the parish of discretion to receive the communion; yet

[y] See Appendix. [z] 6 & 7 Will. 4, c. 86, s. 27.

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there shall be no communion, except four (or three at least) communicate with the priest. Secondly, as to the frequency of the times at which this rite is to be administered. Every parishioner shall communicate at least three times in the year, of which Easter to be one. And in cathedral and collegiate churches, and colleges, where there any many priests and deacons, they shall all receive the communion with the priest every Sunday, at the least, except they have reasonable cause to the contrary.[a]

When to be administered.

In cathedral and collegiate churches.

The ancient canon law also required that lay parishioners who were duly qualified should communicate at least three times in the year, viz. at Easter, Whitsuntide and Christmas; but as to the frequency of the times in some particular cases, the canon law appears to have been less strict than the rubric, for it is ordered by the canon law that all deans, heads of cathedral and collegiate churches, vicars, petty canons, and all others of the foundation, shall receive the communion four times in the year at the least.

In all colleges and halls within both the universities, the master and fellows shall be careful that all their pupils, and the rest that remain among them, do receive the holy communion, which we ordain to be administered in all such colleges and halls, the first and second Sunday of every month; requiring all the said masters, fellows, and scholars, and all the rest of the students, officers, and all other the servants there, so to be ordered, that every one of them shall communicate four times in the year at least, kneeling reverently and decently upon their knees, according to the order of the communion book prescribed in that behalf.[b]

In colleges and halls.

But the canon law appears to have entered more minutely and particularly into the causes, for which a person was not to be admitted to the holy communion, and the canon law may perhaps still be a guide to what is said only generally in the rubric, although where it is in any way contradicted by the rubric the latter must of course prevail.

Causes for which it may be refused.

The following are the directions of the canon law in this respect.

No minister shall in any wise admit to the receiving of the holy communion any of his cure or flock, which be openly known to live in sin notorious, without repentance; nor any who maliciously and openly contend with their neighbours; nor any churchwardens or sidemen who refuse or neglect to make presentment of offences according to their oaths.[c]

No minister, when he celebrateth the communion, shall wittingly administer the same to any but to such as kneel,

[a] Rubric at the end of communion service. [b] Canon 23. [c] Canon 26.

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under pain of suspension; nor, under the like pain, to any that refuse to be present at public prayers, according to the orders of the Church of England; nor to any that are common and notorious depravers of the Book of Common Prayer, and administration of the Sacraments, and of the orders, rites and ceremonies therein prescribed; or of any thing that is contained in any of the Thirty-nine Articles; or of any thing contained in the book of ordering priests and bishops; or to any that have spoken against and depraved his majesty's sovereign authority in causes ecclesiastical; except every such person shall first acknowledge to the minister before the churchwardens his repentance for the same, and promise by word (if he cannot write) that he will do so no more; and except (if he can write) he shall first do the same under his handwriting, to be delivered to the minister, and by him sent to the bishop of the diocese or ordinary of the place. Provided, that every minister so repelling any, for any of the causes here specified, shall, upon complaint, or being required by the ordinary, signify the cause thereof unto him, and therein obey his order and direction.[d]

If any offend their brethren, either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, or any other uncleanness or wickedness of life, such notorious offenders shall not be admitted to the holy communion till they be reformed.[e]

Quære, can such a refusal be the subject of an action?

All these causes are so general and appear to depend so completely upon the judgment and opinion of the minister, that it has been doubted whether an action would not lie against him for the injury which would result to the character of one, whom he might refuse to receive as a communicant. In Comyn's Digest[f] it is said that an action on the case does not lie for refusing to administer the Sacrament: but the case referred to as an authority[g] is one which is also mentioned by Doctor Burn; and in which no express decision was given on the point, as the declaration was held bad: and the main question was therefore not decided. Probably the remarks which are to be found in a preceding chapter,[h] upon the subject of a clergyman refusing to marry, may be as nearly as possible applicable to the present case.

The difficulty of drawing a good declaration would be considerable; the refusal must probably have been malicious; and even then the success of such an action would appear doubtful.[i] There can however be no question but

[d] Canon 27. [e] Canon 109. [f] Action on the Case, B. 1.
[g] *Clovell* v. *Cardinal*, 1 Sid. 34. [h] Marriage, ante.
[i] See Lord Denman's judgment, in *Davis* v. *Black*, 1 Q. B. R. 910.

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that the refusing to administer the Sacrament to any one without sufficient cause would be an offence of the highest order against the ecclesiastical law, and one for which the minister should now be punished by proceeding under the church discipline act.[k] And it is also declared by a statute of the first year of Edward VI. that the minister shall not without a lawful cause deny the Sacrament to any person that will devoutly and humbly desire it.

Minister to give notice.

The minister shall always give warning for the celebration of the holy communion upon the Sunday, or some holiday immediately preceding; and this direction of the rubric was also given by the canon law, which added: Which warning we enjoin the said parishioners to accept and obey under the penalty and danger of the law; and the rubric further directs, that so many as intend to be partakers of the holy communion shall signify their names to the curate at least some time the day before, and this therefore the minister, if he thought proper, might enforce, and might be justified in refusing the Sacrament to a person on the ground of his not having complied with this, especially if such a general regulation had been made by him.

Notice to be given to minister.

Communion tables.

In all churches, convenient and decent communion tables being provided, they must be kept in a seemly condition, covered, in time of divine service, with a carpet of silk, or other decent stuff; and, at the time of ministration, they should be covered with a fair linen cloth; at which time the table shall be placed in so good sort within the church or chancel as thereby the minister may be more conveniently heard, and the greater number of communicants may be accommodated.[l]

Bread and wine to be provided.

The churchwardens are to provide a sufficient quantity of fine white bread, and of good wholesome wine, with the advice of the minister;[m] and although, in the case of *Franklyn* v. *The Master and Brethren of Saint Cross*, the vicar, by the endowment, was to find the sacrament wine, yet the court were of opinion that it should be found by the parish, according to the canon or rubric, which is established by act of parliament.[n] The disposal of the bread and wine remaining is sufficiently directed by the rubric.

The habit to be worn by the minister officiating in the communion service has been already fully spoken of in the chapter on Public Worship.

To be administered in both kinds.

The statute of the first year of Edward VI. after reciting that it is more agreeable to the first institution of the holy Sacrament, and more conformable to the common use and

[k] See ante, constitution of Langton. [l] Canon 82.
[m] Canon 20. [n] 2 Burn's E. L. 426.

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practice of the apostles and of the primitive Church, for above five hundred years after Christ's ascension, that the same should be administered under both the kinds of bread and wine, than under the form of bread only; and also it is more agreeable to the first institution of Christ, and to the usage of the apostles and the primitive Church, that the people should receive the same with the priest, than that the priest should receive it alone, enacts that the said most blessed Sacrament be commonly delivered and administered unto the people under both the kinds, of bread and wine, except necessity otherwise require.

Cases in which communion may be privately administered.

No minister is to administer the holy communion in any private house, except it be in times of necessity, when any being either so impotent as he cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy Sacrament, upon pain of suspension for the first offence, and excommunication for the second. Provided that houses are here reputed for private houses wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm. And provided also, under the pains before expressed, that no chaplains do administer the communion in any other places but in the chapels of the said houses; and that also they do the same very seldom upon Sundays and holidays, so that both the lords and masters of the said houses, and their families, shall at other times resort to their own parish churches, and there receive the holy communion, at the least, once every year.[a]

An exception is thus made in the case of persons who are unable to come to church, or dangerously ill; and so by the rubric it is directed that if the sick person is unable to come to church, and yet is desirous to receive the communion in his house; then he must give timely notice to the curate, signifying also how many there are to communicate with him, (which shall be *three or two at the least*,) and having a convenient place in the sick man's house, with all things necessary so prepared that the curate may reverently minister, he shall there celebrate the holy communion.

In no case may the Sacrament be administered to one person only.

It appears therefore that there could be no case of urgency or necessity which would authorise the minister to administer the Sacrament to one person only.

Visitation of the sick.

By the canon law when any person is dangerously sick in any parish, the minister or curate, having knowledge thereof, shall resort unto him or her, (if the disease be not known or probably suspected to be infectious,) to instruct and comfort them in their distress, according to the order

[a] Canon 71.

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of the communion book if he be no preacher, or if he be a preacher then as he shall think most needful and convenient.[o]

The office of visitation for the sick, and the duties of a minister in relation thereto, are sufficiently prescribed by the rubric and by the Book of Common Prayer; it must not therefore be forgotten that ministers neglecting this duty are committing a breach of the canon and statute law.

Alms at the offertory.

The rubric also enjoins the collection of alms for the poor and other oblations of the people by the deacons, churchwardens, or other fit persons during the reading of the offertory, and they are to bring them to the minister to be disposed of; the sums thus collected are to be employed in such pious and charitable uses as the minister and churchwardens shall think fit, or, in case of their disagreement, by the ordinary.

How they are to be disposed of.

There would appear therefore from the directions of the rubric, and also from the sentences to be read at such times, to be two purposes for which such collections are to be made, viz. alms for the poor and oblations, which latter word is commonly used to denote what is given to the minister.[p] But in Ayliffe's Parergon[q] it is said, that the oblations made at the communion were at the reformation changed into alms of charity for the poor parishioners. And practically there would appear almost insuperable difficulties if any other course were to be adopted, for a question would arise in every parish as to the proportion in which the money should be divided, if to be applied to the two purposes: the amount of the revenues of each clergyman would be rendered wholly uncertain; and parties might be unwilling to contribute towards increasing the salary of the minister, who might otherwise wish to give to the poor. It is probable moreover that the sentences of the offertory which would appear to sanction the oblations to the minister are only retained there from the older prayer-books before the change spoken of by Ayliffe was introduced. The simple and uniform practice of disposing of all money thus collected for the poor of the parish was considered as the only legal practice by Sir Littleton Powys[r] in a trial before him in 1719; but that trial appears altogether so eccentric, and to have partaken so much of the political spirit of the day, that less weight is to be attached to it. It derives however more importance from a letter written afterwards upon the subject of

[o] Canon 76.
[p] See ante, Book II. Chap. 3.
[q] Ayl, Par. 394.
[r] Howell's State Trials, vol. 15.

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it to the Lord Chancellor by Sir Littleton Powys himself, which contains his deliberate opinion "that the parson and churchwardens, either jointly or severally, could not appoint any collection for charity other than in common form for the poor of their parish, and that those are the charitable purposes intended by the rubric at the communion service." This however is only the opinion of a single judge, and although this statement of the law as to this point has never been expressly overruled, yet the case appears to have been considered by Lord Stowell as one of party heat which took place in times of party ferment and of smaller authority on that account.[s] The law on this subject must therefore be considered as still unsettled: but the circumstance, that no cases are to be found upon the many subjects of dispute, which would appear inevitable if the two purposes are to be deemed proper, will serve to show what has hitherto been the generally established custom in this respect. The rubric speaks of the money collected as to be disposed of after divine service ended. And it appears evident that an immediate disposal of it is contemplated by the rubric, unless there should be any disagreement between the minister and churchwardens. The practice however appears to have been otherwise. The alms collected at the reading of the offertory in proprietary chapels are not to be distributed by the minister or other officers of such chapels, but are to be made over to the minister and churchwardens of the mother church to be distributed by them. And this was so decided by Sir J. Nicholl, in a case where the minister of the parish had cited the minister of such a chapel within his parish to answer, among other things, for appropriating the alms received at the Lord's Supper, in defiance of an order to pay them over. After referring to the directions of the rubric which we have already mentioned, Sir J. Nicholl observed, that those directions as to the churchwardens, who are the officers of the parish, and not of the chapel, led him to construe the minister to mean the minister of the parish; and that they showed that the rubric intended that the alms received at the communion, as well in private chapels as in the parish church, should be at the disposal of the minister of the parish and the churchwardens; and should not belong to the officiating minister nor to the proprietors of the chapel.[t]

At what time.

If collected in a chapel within a parish they are to be handed over to the minister and churchwardens of the parish.

[s] *Hutchins* v. *Densiloe*, 1 Hagg. Cons. 174.
[t] *Hilcoat* v. *Mossey*, 2 Hagg. Cons. 174.

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BOOK VII.

OF THE DUTIES OF A CLERGYMAN IN HIS INTERCOURSE WITH HIS PARISHIONERS.

CHAPTER I.

PARISH VESTRIES.

In its first and proper meaning the word vestry signifies the room or place adjoining or belonging to the church in which the vestments of the minister of the parish are deposited or kept; but it has been commonly appropriated to designate the assembling of the parishioners for the dispatch of the affairs and business of the parish, it having been customary on such occasions to use the vestry as the place of holding such meetings. Of these vestries, or vestry meetings, there are two kinds, general vestries and select vestries; and these latter may be again divided into such as are select vestries by custom and select vestries constituted such by acts of parliament; of these we shall speak in their order.

General vestries.

Select vestries by custom and by statute.

SECTION 1.

Of General Vestries.

Notwithstanding that the meeting of the parishioners has been so customarily held in the vestry as to have thence derived its name, it is by no means essential to the validity of the meeting that it should be there held, and it may be convened elsewhere in any other fit and convenient place, or in the church itself; but if it be held either in the church or in the vestry room, the ecclesiastical court has jurisdiction *ratione loci*[a] over any misconduct or disorder com-

Where vestries may be convened.

[a] Lord Raym. 350.

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Jurisdiction of ecclesiastical court over them.

mittted therein; but more license would be permitted in the vestry room than in the church itself, as the former is the proper place for parish business; and the court would not in such cases interpose, except for the preservation of due order and decorum.[b]

But besides that these meetings are thus connected with the church, and that the ecclesiastical court has jurisdiction over them, a somewhat particular notice of them is essential in this work, since the minister of the parish, whether he be rector, vicar or perpetual curate, has always a right, and, as it seems, it is a part of his duty, to preside at them; for he is not like the other parishioners who assemble there, but is always described in his separate capacity as a part of the parish, the form of citing a parish being—"the minister, churchwardens and parishioners." And, therefore, that he and any other individual should be put in competition for the office of chairman, would be placing him in a degrading position, in which he is not placed by the constitutional establishment of this country.[c] We have already observed that vestry meetings may be legally held elsewhere than in the church or vestry room; and where this is done, it has been urged that the minister has not the same right of presiding, but that the right only exists in his church or vestry room *ratione loci*;[d] but it is now clearly established that the place of holding the meeting does not affect or alter the right of the minister, but that he has always the right to preside.[e]

Right of minister to preside,

wherever the meeting may be held.

Whenever, therefore, such meetings are held, he is, in sound legal principle, the head and *præses* of the meeting; and, as such, it is essential that he should be acquainted with the law by which such meetings and their powers and proceedings are regulated, defined and directed.

Convocation of the vestry.

And, first, as to the convocation of the meeting: vestries are usually held according as the exigencies of the parish require; but no vestry, or meeting of the inhabitants in vestry, of or for any parish, shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice, which must be reduced into writing, and written or printed copies thereof affixed on or near to the doors of the churches or chapels within the parish or place previously to the commencement of divine service.[f]

By notice affixed on church doors previously to divine service.

[b] *Wilson* v. *M'Math*, 3 B. & Ald. 241; *Hutchins* v. *Denziloe*, 1 Hagg. 185.
[c] *Wilson* v. *M'Math*, ibid.; *Reg.* v. *D'Oyly*, 12 Ad. & Ell. 139.
[d] Arguendo in *Reg.* v. *D'Oyly*, ante. [e] Ibid. [f] 58 Geo. 3, c. 69, s. 1.

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Vestries are to be called by the churchwardens, with the consent of the minister, and this was always so by the common law. The act of parliament, by which general vestries are regulated, commonly known as Sturges Bourne's Act, or the Vestry Act,[g] makes no alteration in this particular. It does not appear, however, that either the minister or churchwardens have any absolute discretion in this matter, but that they are bound to perform their parts in convening a vestry, if necessary; and as the churchwardens, refusing to call a vestry for the legal duties of the parish, might be compelled to do so by mandamus;[h] so it may be presumed that a minister would be compelled to give his consent, if he should withhold it without sufficient reason; or that the vestry might be convened by the churchwardens notwithstanding. But a private parishioner had no right given him by the statute, nor could he have had any before, in case of the refusal of the churchwardens, to publish a notice for a vestry to choose new churchwardens, or for any other purposes.[i]

To be called by churchwardens with consent of minister.

Private parishioner has no right to give notice of vestry.

The parishioners, constituting the vestry, are, at the common law, all such as pay to the church rates, or scot and lot, and no others;[k] but residence within the parish is not a necessary qualification, as all out dwellers, who are rated in respect of any property in the parish, have a vote in the vestry, as well as the inhabitants, and are entitled to the same benefit[l] of the Vestry Act hereafter mentioned. Nor is the payment of church rates essential to entitle a person to vote at vestry meetings. And although at a meeting of the parishioners, in whom, by the custom, the right of electing to a perpetual curacy was vested, it was resolved, before the election began, that parishioners, who had not paid (not having been assessed to) church rates, should not be allowed to vote; and, in consequence, several persons, legally qualified to vote, did not tender their votes; and the votes of others were rejected, because they had not paid the church rate, though they had paid poor rates; it was held, by the Court of King's Bench, that the election was not according to the custom; and that it was not competent to the parishioners assembled to narrow the custom by passing a bye law, which would have the effect of making it depend upon the will of particular persons, whether a person had a right to vote or not, by inserting, or omitting to insert, the names of any particular parishioners in the church rate.[m]

What parishioners constitute the vestry.

Payment of rates.

[g] 58 Geo. 3, c. 69.
[h] Prideaux, s. 35.
[i] *Dawe* v. *Williams*, 2 Add. R. 138.
[k] Shaw's P. L. c. 17.
[l] 58 Geo. 3, c. 85.
[m] *Faulkner* v. *Elger*, 6 D. & R. 517; 4 B. & C. 449.

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But although, as we have already seen, the actual payment of church rates has been held not to be necessary to entitle a parishioner to vote at vestry meetings, yet it seems that *rateability* is necessary; for it is provided, that when any person shall have become an inhabitant of any parish, or become liable to be rated therein, since the making of the last rate for the relief of the poor thereof, he shall be entitled to vote for and in respect of the lands, tenements and property for which he shall have become liable to be rated, and shall consent to be rated, in like manner as if he should have been actually rated for the same.[m]

Rateability is necessary.

But no person, who shall have refused or neglected to pay any rate for the relief of the poor, which shall be due from him, shall be entitled to vote, or to be present in any vestry of the parish, for which such rate shall have been made, until he shall have paid the same.[n] And with respect to the votes of companies, &c. by their clerks, &c., it is provided, that no such clerk, secretary, steward or agent, shall be entitled to be present or to vote at any vestry in such parish, unless all rates for the relief of the poor, which have been assessed upon the annual rent, profit or value, in right of which any such clerk, &c. shall claim to vote, then due, and which shall have been demanded at any time before the meeting, shall have been paid and satisfied.[o]

Refusal or neglect to pay poor rates disqualifies.

And in cases of clerks, &c. of companies.

The vestry, then, is constituted of rateable parishioners, all of whom have a right to be present; so that, if any is excluded, he may bring an action on the case against the party who excludes him:[p] nor is it allowable to do anything which may tend to exclude, even after business may have been begun. Thus, it is illegal to close the doors so as to exclude voters, especially during a poll;[q] but it is by no means necessary to constitute the vestry, that all who have the right should be there present, for the majority of those present may bind the parish to all legal acts, however small their number, or however important the act; and even in the case above mentioned, where the doors had improperly been kept closed, and the admittance of voters had been delayed, the court refused a mandamus for a fresh election, because it did not appear that any voter had been actually excluded.[r]

Illegal to do any thing to exclude those who have a right to be present.

The chairman.

The vestry, thus constituted, is incomplete without its head or president; and he, as we have seen, by the common law, is the minister of the parish, whether rector, vicar, or

[m] 58 Geo. 3, c. 69, s. 4.
[n] Sect. 5, as corrected by 59 Geo. 3, c. 85.
[o] 59 Geo. 3, c. 85.
[p] 8 Mod. 52, 351, 354; Viner's Abr., Vestry.
[q] *Queen* v. *St. Mary, Lambeth*, 3 Nev. & Per. 416.
[r] Ibid., and see 8 Ad. & Ell. 356.

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perpetual curate; and it has been said that he has a special duty to perform, and must be responsible to the bishop for his care therein.[s]"

This right of the minister to be the chairman is indirectly recognised in the Vestry Act, which provides that, in case the rector, vicar, or perpetual curate, shall not be present, the persons assembled shall forthwith nominate and appoint, by plurality of votes, to be ascertained as therein directed, one of the inhabitants of such parish to be the chairman, and to preside in every such vestry; and this is nearly tantamount to a declaration, or by necessary implication declares, that if the rector, vicar, or perpetual curate, be present, he shall preside: and the legislature must evidently have considered that by law and usage he was so entitled. And the following are the very clear and explicit words of Lord Denman in a recent case, in 1840,[t] in speaking of the election of churchwardens in vestry, "The rector is the proper person to preside, as of common right, and as owning the freehold of the church. And churchwardens are so far ecclesiastical officers, that the rector is entitled to interfere in bringing them into existence. The cases confirm this opinion; and a further sanction is given to it by stat. 58 Geo. III. c. 9, which does not profess to confer this right on the rector, nor use language declaratory of it, but assumes and recognises his possession of it, by enacting, in sect. 2, that, *in case the rector shall not be present,* the meeting shall nominate a chairman."

Who is to preside in the chairman's absence.

Lord Denman on the right of minister to preside.

The vestry, thus completely constituted, has the right to investigate and restrain the expenditure of the parish funds, to determine the expediency of enlarging or altering their churches and chapels, or of adding to, and in some cases of disposing of,[u] the "goods and ornaments" connected with those sacred edifices. The election of some of the parish officers is either wholly or in part to be made by the vestry, and it has either directly or indirectly a superintending authority in all the weightier matters of the parish.

Power of vestry in parish matters.

Several recent local acts of parliament have given the vestry power to do certain acts within their parish which are or may be inconsistent with the general ecclesiastical law; and in such cases the statute is to be preferred. An instance of this kind has been already mentioned under the head of burial. And where a local act enacted that the vestrymen should set out and appropriate such a number of seats for the gratuitous accommodation of the poor, and

[s] *Wilson* v. *M'Math*, ante, 2 Add. 134; 1 Curt. 522.
[t] *Reg.* v. *D'Oyly*, 12 Ad. & Ell. 158.
[u] But see chapter on "Churchwardens and Ornaments of the Church."

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also such other pews or seats for the use of the parishioners as the vestrymen should think necessary, proper and convenient; and also enacted, that it should be lawful for the vestrymen to let the pews, &c. or any of them (save and except the pews or seats to be appropriated for the accommodation of the poor of the parish for the time being), to such persons as, &c., it was held that this enactment superseded the general law before mentioned, as to the right of the rector to seats in the church or chancel: and consequently that the vestrymen were justified in removing the rector from one of two seats which he had occupied ever since his induction, and that the matter was taken out of the superintendence of the ordinary.[x]

Proceedings in vestry.

The manner in which the proceedings of the vestry are to be conducted, is, above all, important to the minister, who, as chairman, has the duty of controlling those proceedings, and of taking care that they are legally conducted.

Adjournment.

If circumstances should render an adjournment necessary, the chairman has an undoubted right to adjourn; this may be said now to be firmly and fully established, although the existence of such a right in the chairman, especially with reference to an adjournment for the purposes of polling, has been often questioned of late. But though the right of adjournment is undoubtedly now settled to be in the chairman, it seems also clear that the courts would interpose if that right was in any way abused.[y]

Right of, is in the chairman.

In an old case,[z] it was held that the right of adjourning a meeting, whilst the poll for the election of a churchwarden was proceeding, was not vested in the chairman, but in the whole assembly, where all are on an equal footing; although there might be a difficulty in polling for an adjournment, yet as there was no other way, that must be taken. But as an authority to the length which these words would seem to imply, this case has been over-ruled; for the idea of polling for an adjournment, as we shall presently see, has been distinctly repudiated. But the adjournment in this case was one of time, and was in fact an interruption of business legally proceeding, and the proposal of a postponement of it to a future time was without any plea of necessity, or even convenience, to justify it; and it was there observed, "if the chairman had an arbitrary power of postponement for a day, why not for a week or longer period?" And the case may stand well, and has in fact been recognised as an authority, that if the inten-

But must not be exercised to the interruption of the business.

[x] *Spry* v. *Flood*, 2 Curt. 362.
[y] *Stoughton* v. *Reynolds*, 2 Str. 1045, as recognised in *Reg.* v. *D'Oyly*, ante.
[z] Ibid.

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tion and effect of the adjournment were to interrupt and procrastinate the business, such an adjournment would be illegal.

Cases on adjournment of the poll.

In a case decided in 1834,[a] notice had been given that a vestry would be held in the church, and that, if a poll were demanded, it would be adjourned to the town hall: and accordingly, on a poll being demanded, the chairman, without taking the sense of the meeting, adjourned to the town-hall. It was held that the proceeding was regular, no business having been interrupted by it; and Lord Denman said, "May not a chairman appoint a place for taking the poll? Suppose the proceeding had been appointed to take place in the church, and that the meeting had become so tumultuous that it became necessary to adjourn to the churchyard, would it have been irregular to do so?"

In the case last mentioned, the judges appeared to be careful not to overrule distinctly the case of *Stoughton* v. *Reynolds* above mentioned; but the authority of that case was much narrowed by this decision; and, in a note to this case, another case is mentioned, which had occurred two years previously; and it appears there to have been doubted whether the chairman could adjourn to a subsequent day, supposing it admitted that he might adjourn to some other place on the same day.[b]

The next case on this subject occurred in the Ecclesiastical Court.[c] And Sir Herbert Jenner, alluding to the above case of *Stoughton* v. *Reynolds*, said that he considered it only as an authority that the chairman had no right, *ex mero motu*, to adjourn a vestry meeting whilst the business was in progress; and, referring to the case last mentioned, of *The King* v. *The Archdeacon of Chester*, he goes on to say, neither of the learned judges denied the authority of the case of *Stoughton* v. *Reynolds*, but held that it did not apply to the case before them. They did not recognize a discretionary power in the chairman to adjourn the meeting arbitrarily; but considered the adjournment of the poll a part of the original proceeding. So in this case it was competent for the chairman to pursue the course expressly pointed out in the notice. In the case before the King's Bench, the adjournment was from the church to the town-hall: in the present case, it was from the vestry-room to the town-hall of Dudley. There was no surprise in this case, for the notice expressly stated that such would be the

[a] *R.* v. *Archdeacon of Chester*, 1 Ad. & Ell. 342.
[b] Parke, J., in *R.* v. *Churchwardens of Lambeth*, 1 Ad. & Ell. 342, n.
[c] *Baker* v. *Downing and Wood*, 1 Curt. 507.

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course adopted. The notice was given, in pursuance of the Vestry Act, four days before the vestry was held; and there is every reason to believe, from what appears in the evidence, that it was known immediately after publication throughout the whole town of Dudley." And in this last case it was further held that the town-hall, although private property, was not an improper place to adjourn to.

In the two cases last mentioned, the adjournment was made in pursuance of an intimation to that effect, contained in the original notice of vestry, but this appears to be unimportant, for as it was well put *arguendo* in the case of *The King* against *the Archdeacon of Chester*—if a right of adjourning is not in the chairman, he cannot transfer it to himself by giving notice beforehand that in a certain event he will exercise it, and in the case of *The King* against *the Churchwardens of St. Mary, Lambeth*, no previous notice of the adjournment of the poll had been given, and yet the election at such adjournment was held good.

No previous notice of adjournment necessary to give chairman the right to adjourn.

A later decision of the Court of Queen's Bench in 1840[d] declares the right of the chairman in plainer and stronger terms, and expressly limits the authority of the old case of *Stoughton* v. *Reynolds*. The following are the words of Lord Denman in giving judgment, and it may be remarked that they are particularly explicit: "The meeting being held, and a show of hands taken, some one was to declare on whom the nomination had fallen. Who was to do that? Not the body of the parishioners, who had made the nomination, nor the old churchwardens, but the person presiding at the vestry, namely, *the rector*. A poll is then demanded; and it is demandable as of right; and the president of the meeting is the person to grant it. In the absence of other business, the poll should be taken immediately: if time does not allow of that, there must be an adjournment for the purpose. Then, who is to direct the adjournment? It is suggested that a majority of the voters should do so. But how is the majority to be ascertained in so large a constituency; and what is the situation of parties, if the majority present decide against adjournment; so as to leave no time for a considerable part of the ratepayers to vote. Setting aside the inconvenience that might arise if a majority of the parishioners could determine the point of adjournment, we think that the person who presides at the meeting is the proper individual to decide this. It is on him that it devolves, both to preserve order in the meeting, and to regulate the proceedings, so as to give all persons entitled a reasonable opportunity of voting. He

[d] *Reg.* v. *Hedger*, and *Reg.* v. *D'Oyly*, 12 Ad. & Ell. ante.

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is to do the acts necessary for these purposes on his own responsibility, and subject to his being called upon to answer for his conduct if he has done anything improperly. The case of *Stoughton* v. *Reynolds* is a good authority, but should not be pressed to the extent to which the argument in support of this rule would carry it. As it has been explained, it does not decide that the rector may not adjourn the meeting; but only that, if he has done it, so as to disturb the proceedings, the court will interfere."

Adjourning to a subsequent day.

It may be observed, that, in all the cases decided, the adjournment was as to place, rather than time; and if the chairman were to fix a subsequent day for the polling, without sufficiently strong reason, it would probably be within the principle, for which the case of *Stoughton* v. *Reynolds* is now considered an authority.

Principle on which votes are allowed.

Plurality of votes.

The principle, according to which the votes of the parishioners are to be given, is next to be considered: and in this, the Vestry Act before mentioned has made a most important alteration, transferring the right of voting, in effect, from the person to the property; or at least giving to property a direct influence in these matters, which it did not possess under the former system. It is provided by the third section of the act, that in all such vestries, every inhabitant present, who, by the last rate made for the relief of the poor, shall have been assessed, in respect of any annual rent, profit or value not amounting to 50*l.*, shall give one vote, and no more; if assessed for any such annual rent, &c., amounting to 50*l.*, or upwards (whether in one or more than one charge) shall be entitled to give one vote for every 25*l.*, in respect of which he shall have been assessed, but so that no inhabitant shall give more than six votes; and where two or more of the inhabitants present shall be jointly rated, each shall vote according to the proportion, which shall be borne by him, of the joint charge; and where only one of the persons jointly rated shall attend, he shall vote according to the whole of the joint charge.[a]

In certain proportions, according to rateability.

Principle extended to clerks, &c. of corporations and companies.

By the stat. 59 Geo. III. c. 85, after reciting the Vestry Act of the preceding year, it is enacted that in all cases, where any corporation or company shall be charged to the rate for the relief of the poor of such parish, either in the name of such corporation, or of any officer of the same, their clerk, secretary, steward, or other agent, duly authorised for that purpose, may be present at the vestry, and shall be entitled to give such and so many vote or votes at such vestry, in respect to the amount of the rents, &c. of

[a] 58 Geo. 3, c. 69, s. 3.

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such corporation or company, as any inhabitant assessed to such rate, present at such vestry, might have and be entitled to, under the recited act.

Inhabitants coming to a parish since the last rate.

When any person shall have become an inhabitant of any parish, or become liable to be rated therein, since the making of the last rate for the relief of the poor thereof, he shall be entitled to vote for and in respect of the lands, tenements, and property for which he shall have become liable to be rated, and shall consent to be rated, in like manner as if he had been actually rated[f] for the same.

Chairman has a casting vote in addition to his own.

If the votes are equal, the chairman, in addition to the votes which he may have, by virtue of the Vestry Act, in right of his assessment, has the casting vote.[g]

Mode of voting.

Must not be by ballot or by proxy.

The mode of voting may also be of importance to the validity of the proceedings. The common law mode of election is by show of hands or by poll; and the party electing is then said to have a voice in the election. It is clear that, at common law, where parties have the right of voting, the restriction of voting by ballot cannot be imposed; it presents an insurmountable difficulty to a scrutiny, because no person can tell for whom a particular individual voted; besides, under the Vestry Act, where one person may have any number of votes to the amount of six, other objections might present themselves to voting by ballot. It is therefore evident, that the common law mode of voting ought to be adhered to. These reasons are equally cogent against voting by proxy.[h] And where more than one person is put up on each side, a show of hands would be insufficient. And where a plurality of votes is allowed, a poll is absolutely necessary.

Show of hands not necessary. Poll may be directed by chairman without it.

And the chairman may direct a poll without first taking a show of hands, although in the case decided, a show of hands was demanded, and a poll not demanded, but objected to; and it may be observed, that in voting under the provisions of the Vestry Act, a show of hands would be no criterion. And, if a show of hands be taken, any who may not be there present, may nevertheless vote afterwards at the polling.[i]

Duration of the poll.

Where there is a custom to determine the period of polling, provided that time be reasonable, it must be abided by, and neither the electors, nor the chairman, could abridge it;[k] but it is obvious that a custom which might originally have been reasonable, as to time, would not be

[f] 58 Geo. 3, c. 69, s. 4. [g] 58 Geo. 3, c. 69, s. 2.
[h] See *Faulkener* v. *Elger*, ante; Steers, P. L. 2d ed. p. 272.
[i] 7 Ad. & Ell. 259; 5 Ad. & Ell. 874.
[k] *Reg.* v. *Commissary of Winchester*, 7 East, 574.

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so, where the population of the parish, and consequently the number of voters, had greatly increased.

In the absence of any custom (and such would probably very rarely exist) it seems, of necessity, to be the duty of the chairman of the meeting to fix the time for the duration of the poll, subject, as in the case of adjournment, to the revision of the court, if the time is fixed improperly. Sir Herbert Jenner, in giving judgment in a case in the ecclesiastical court,[1] says, "It is not very easy to determine what time should be allowed, so as to give every person entitled an opportunity of recording his vote; and all that can be said is, that where no custom exists, a reasonable time should be given." The number of parishioners qualified to vote had been variously stated at between 1,200 and 1,600, and Sir H. Jenner says, "There is not sufficient evidence to satisfy me that all the parishioners qualified and desirous of voting, might not, if due diligence had been used, have recorded their votes before the time when it was understood the poll was to cease. Ninety polled in an hour is no great number; some, indeed, think that 150 might be polled in an hour, but even if only 100 were polled in an hour, there was sufficient time for all persons desirous of voting to attend for that purpose. I must say, that it would have been more satisfactory if the poll had been kept open till four o'clock the last day." And from the number of voters here mentioned, and from what is said in respect of them, it may probably be sufficiently inferred what would be considered a reasonable time, according to the number of voters in each particular parish.

What would be deemed a reasonable time according to the number of voters.

And probably, in any case which might be brought before the courts, the principle of a case before mentioned would be applicable, where, although it was declared to be illegal to close the doors during the meeting, yet, as no voter was proved to have been excluded, a *mandamus* for a fresh election was refused. So, probably, a *mandamus* would be refused, unless it were proved not only that the time fixed was unreasonably short, but that some voters had been unable to poll in consequence.

In the last-mentioned case, it had been urged in argument that time ought to have been allowed for every person to qualify himself to give his vote by paying his rates, which might not have been paid previously; but Sir Herbert Jenner says, "I do not accede to the proposition that the time allowed for the poll should be calculated with reference to such a principle. I apprehend that the

Time not necessarily to be calculated so as to allow parties to pay rates in arrear.

[1] *Baker* v. *Downing and Wood*, ante.

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time need only be fixed so as to allow every person qualified to tender and record his vote, without any reference as to what may be done by persons not already qualified. It is no part of the purpose for which a poll is demanded, that it should give time for the payment of the rates, but only to allow persons already qualified sufficient time to tender and record their votes."

Chairman should not grant a poll for voting on an illegal subject,

The chairman of a vestry meeting seems to have this further power, that he may refuse to grant a poll, if it is demanded for voting on a subject which is not legal. Thus, in a case in the King's Bench, certain persons had bequeathed property to be applied to particular objects of charity in the parish. At a vestry meeting, holden on the 7th of January, a resolution was proposed and carried, that a tablet or monument should be erected to record the bequests of the devisors, to be paid for out of the funds issuing from the bequests. On the 21st of January another vestry meeting was held, at which the resolution of the last meeting was confirmed upon a show of hands. A poll was demanded by the opponents of the resolution, but the churchwarden who presided at the meeting refused to grant it. In opposition to the grant of a *mandamus*, it was objected that such an application of the funds would be a breach of trust, and that the court ought not to grant a *mandamus* for the purpose of putting it to the vote whether such a breach of trust should be committed. Lord Denman says, "We are of opinion that the *mandamus* cannot be granted, and for the reason suggested. It may be said that the object in demanding the poll was to set aside the illegal resolution which had been passed by the show of hands, but we cannot assume that the result of the poll would be to rescind the resolution. If the result were the other way, it would be said that the poll was taken under the authority of a *mandamus* from this court."[m]

nor put an illegal subject to the vote.

The principle of this case, and the words used by Lord Denman, appear to make it an authority beyond the right of refusal to grant a poll; for it seems that the court would never compel a chairman to put an illegal resolution to the vote in any way; and it may be inferred that it is the duty of the chairman to refuse to do so.

Chairman to sign proceedings.

The minutes of the proceedings and resolutions of the vestry are to be fairly and distinctly entered in a book, to be provided for that purpose by the churchwardens and overseers, and are to be signed by the chairman, and such other of the inhabitants present as may think proper.[n]

[m] 1 Ad. & Ell. 380.

[n] 58 Geo. 3, c. 69, s. 2.

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But it has been several times decided that they incur no separate or individual responsibility, for anything which may be done in pursuance of a resolution of vestry, so signed by them. No responsibility incurred thereby.

The books directed to be provided, as above mentioned, and kept for the entry of proceedings, and also all former vestry books, and all rates and assessments, accounts and vouchers of the churchwardens, overseers of the poor, and surveyors of the highways, and other parish officers, and all certificates, orders of courts and of justices, and other parish books, documents, writings, public papers of every parish, except the registry of marriages, baptisms and burials, shall be kept by such persons, and deposited in such place and manner, as the inhabitants in vestry assembled shall direct: and if any person in whose hands or custody any such book, &c. shall be, shall wilfully or negligently destroy, obliterate, or injure the same, or suffer the same to be done, or shall, after reasonable notice and demand, refuse or neglect to deliver the same to such persons, or to deposit the same in such place as shall, by order of vestry, be directed, he shall, upon conviction before two justices of the peace, for every such offence forfeit and pay such sum, not exceeding fifty pounds nor less than forty shillings, as shall by such justices be adjudged; and the same shall be recovered by warrant of such justices, in such manner and by such means as poor rates in arrear, and shall be paid to the overseers of the poor of the parish against which the offence shall be committed, and be applied for and towards the relief of the poor thereof: provided that every person who shall unlawfully retain in his custody, or shall refuse to deliver to any person or persons authorised to receive the same, or who shall obliterate, destroy, or injure, or suffer to be obliterated, destroyed, or injured, any book, &c. belonging to any parish, or to the churchwardens, overseers of the poor, or surveyors, may be proceeded against in any of his majesty's courts, civilly or criminally, as if the act had not been made.[o] Vestry books. Custody of, and access thereto. Punishments for injuring.

The acts of one vestry are not absolutely binding on a succeeding vestry, and they may be confirmed or rescinded by such succeeding vestry; but the confirmation of the succeeding vestry is not necessary to make the acts of the preceding one valid.[p] Review of acts by succeeding vestry.

Some of the foregoing observations will be found to be inapplicable to vestries constituted under the 1 & 2 Will. IV. c. 60, hereafter mentioned; but as that act applies

[o] 58 Geo. 3, c. 69, s. 6. [p] *Mawley* v. *Barbet*, 2 Esp. 687.

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rather to the constitution than to the power and proceedings of such vestries, much that is contained in this section will still be applicable in those cases. It need only be observed, that whenever there appears to be anything conflicting in the law, as applicable to those vestries, the provisions of the special act are to be preferred.

Section 2.

Of Select Vestries by Custom.

Origin of select vestries.

Select vestries seem to have grown from the practice of choosing a certain number of persons, yearly, to manage the concerns of the parish for that year, which, by degrees, came to be a fixed method; and the parishioners lost, not only their right to concur in the public management, but also, in most places, if not in all, the right of electing the managers. And this custom of government of parishes by a select number has been held to be a good custom, and the churchwardens accounting to them has been held a good account.[q]

Much difference of opinion has existed as to the merits of this system, and, in many parishes, great efforts have been made to set aside and demolish select vestries, as being injurious and oppressive; upon which Dr. Burn observes, that no wonder it hath been so, in such parishes, where, by custom, they have obtained the power to choose one another; for it is not to be supposed, but, if they are guilty of evil practices, they will choose such persons as they think will connive at or concur therein.[r]

Upon this opinion of Dr. Burn's it has much more recently been remarked: such is the language employed by writers upon the subject, more than half a century ago; and the history of select vestries, in more recent times, affords no sufficient grounds for believing that the censure is no longer applicable. All experience demonstrates that governing bodies, whose powers are wielded in secret conclave, uncontrolled by a higher authority, or the influence of public opinion, become in time corrupt; not always from bad motives actuating the conduct of the members of such bodies, but from that very love of ease (and the consequent neglect of duty), which is considered as the counterpoise of that love of power, which induces men, in the first instance, to take upon themselves, gratuitously, the burthen

[q] Gibs. 219. [r] 4 Burn's E. L. c. 10.

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of administering public affairs. The propriety, therefore, of inquiring into the foundation of such institutions, in order to ascertain the just limits of their authority, and the responsibility under which it is exercised, is obvious.[s]

The advantages, or disadvantages, of select vestries, would, necessarily, much depend upon the circumstances of each particular parish; but those circumstances, unfortunately, do not affect the question, for select vestries are founded in usage immemorial; and the propriety of such a custom originally in any particular parish, could be no criterion to its fitness, in the altered circumstances of such a parish, at the present day.

Constant immemorial usage and prescription are the basis and only support of select vestries; for they are in derogation of the common law rights of the parishioners, and unless, therefore, they are established by acts of parliament, of which we shall hereafter speak, they can have no other legal origin than custom. Upon this foundation only, the select vestry of St. Mary-at-Hill, London, was confirmed and established in the Court of Queen's Bench; and, for want of such a foundation, the select vestries of St. Saviour and St. Olave, both in the borough of Southwark, have been set aside; and it is quite settled that a select vestry cannot be created by means of a faculty.[t]

Immemorial custom the only foundation for these vestries.

Where a select vestry existed by custom, but a faculty was obtained, naming forty-nine persons, together with the vicar and churchwardens, to constitute that body in future; and appointing that number to be kept up by election, to be made by ten at least, together with the vicar and churchwardens; and, in a few years afterwards, another faculty was obtained, reducing this number of ten to seven; and these faculties had been constantly acted upon for upwards of sixty years; yet it was held, that the custom was not thereby destroyed: because, in the first place, these faculties, though acted upon, had no validity in law; and next it appeared, that ten out of the fourteen vestrymen, who were present at the vestry, holden immediately before the promulgation of the first faculty, were part of the forty-nine named in that faculty; and lastly, the vestry, as appointed by the faculty, and as it had since continued, was not inconsistent with the vestry previously existing by the custom; and therefore there was not, either in fact or in law, any discontinuance.[u]

Applied to the case of a vestry.

And it has been held, that a custom that a select vestry should consist of an indefinite number of members, to be

[s] Steer's P.L. 2d edit. Vestries.
[t] *Berry* v. *Banner*, Peake's R. 156.
[u] *Golding* v. *Fenn*, 7 B. & C. 781; 1 Man. & Ryl. 647.

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filled up at its own choice, without either maximum or minimum being fixed by the custom, is not unreasonable: overruling the dictum of Lord Kenyon in *Berry* v. *Banner*, the court said, "There is obviously no weight in the objection, that without a maximum being fixed, the vestry may consist of too many persons; and, although no numerical minimum be fixed by the custom, it by no means follows as a consequence, that the number may be reduced to two or three, as the objection supposes the law may consider it as part of the custom, that there shall be a reasonable number, with reference to long established usage, and to the population of the parish. That number, which might not be too small, and not unreasonable, three or four centuries ago, in a parish in which there might not be more than a dozen substantial householders, or even fewer, might not be reasonable, on a change of circumstances, when, by covering fields with houses, the number might be increased more than a hundredfold."[x]

The ordinary rules and principles of law which relate to vestries generally are also applicable to select vestries. It may be observed, that if there be any inherent imperfection in their constitution, from which the evils, at any time complained of, necessarily flow, the remedy is in the hands of the legislature. Courts of justice can only administer the law as it exists, and are not responsible for suggested improvements, however salutary; nor at liberty to depart from the settled maxims of jurisprudence, however beneficial it might be in the particular instance.[y]

Legality of a select vestry may be tried incidentally in ecclesiastical court.

The legality of a select vestry may, it seems, be tried incidentally to the principal matter of a suit in the ecclesiastical courts. Thus, in questions of subtraction of church rate, the court having jurisdiction on the subject-matter, is bound, unless stopped by prohibition, to proceed to the trial of a select vestry, by which the rate was made; and it must be a prohibition in the particular suit; for, if other parties before the court upon the same question have been stopped by prohibition, this will not authorise the refusal of the court to proceed with the cause.[z]

But whenever a custom is in dispute, the proper tribunal is a court of common law, and a prohibition will, in all such cases, be granted, if sufficient appears in proof of the alleged custom, and that the matter in dispute in the inferior court depends upon the custom.[a]

[x] *Golding* v. *Fenn*, ante.
[y] Steer's P. L. 2d edit.
[z] *Goodall and Gray* v. *Whitmore and Fenn*, 2 Hagg. R. N. S. 369.
[a] *Batt* v. *Wilkinson*, 4 Burn's E. L. 10.

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A select vestry for the management of parochial affairs cannot elect another select vestry for the management of the poor, within the stat. 59 Geo. III. c. 12.[b]

Section 3.

Of Select Vestries by Statute.

By some of those statutes, which we have before mentioned, for the building and promoting the building of new churches, the system of select vestries has been adopted, for the management of the *ecclesiastical* affairs, in the new parishes or districts which are created by those statutes. And provisions are therein made for the election and constitution of such vestries.

Vestries in new district parishes.

By the stat. 10 Anne, c. 11, it is provided, that five or more of the commissioners therein mentioned, shall, with the consent of the bishop, or ordinary of the place, appoint a convenient number of sufficient inhabitants of each new parish, created by the act, to be vestrymen, and, from time to time, upon the death, removal, or other voidance of any such vestrymen, the rest, or majority of them, may choose another, being an inhabitant and householder of the parish.

Under stat. 10 Anne, c. 11.

In every district, parish, or division of a parish, or district chapelry, or consolidated chapelry, in which any church or chapel shall be built, acquired, or appropriated, by virtue of and under the statutes 58 Geo. III. c. 45, and the 59 Geo. III. c. 134, in which there shall not be a distinct vestry, a select vestry of so many persons as the commissioners shall direct shall be appointed by the commissioners, with the advice of the bishop, out of the substantial inhabitants, for the care and management of the church or chapel, and all matters relating thereto; and such select vestry shall annually elect the church or chapelwardens on the part of the parish or chapelry, and shall elect new members of such vestry, as vacancies shall arise by death, resignation, or ceasing to inhabit the parish; and proper pews shall be provided for the use of the church or chapelwardens.[c]

Under stats. 51 Geo. 3, c. 45, and 59 Geo. 3, c. 134.

In these cases, therefore, the number is fixed and limited by the commissioners and bishop, but the individuals, ultimately, are such as the vestrymen themselves may choose.

And this power of electing new members by the select vestrymen, as vacancies may arise, in such manner as

The places of select vestrymen not attend-

[b] *Reg.* v. *Woodman*, 4 Barn. & Ald. 507.

[c] Sect. 30.

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ing the meetings may be filled up.

above mentioned, has been recently extended to cases, where any vestrymen shall neglect to attend the meetings of such select vestry for the space of twelve months: provided such select vestry shall have met at least three times during such twelve months; and in every such case it shall be lawful for such select vestry to declare the member or members of such select vestry, so neglecting to attend, no longer a member or members of such vestry, and the vacancy or vacancies thereby created shall be filled up in the manner directed by the last-mentioned act, with respect to vacancies arising by death, resignation, or ceasing to inhabit the parish.[d]

Such a select vestry cannot make a rate for repairs of the church.

But a select vestry, constituted by the 59 Geo. III. c. 134, although it is appointed for the care and management of the concerns of the church, or chapel, and all matters and things relating thereto, has no power to make a rate for the repair of the church.

In the case where this question was decided,[e] Lord Tenterden says—"Under the authority of the 134th section, the select vestry was established; and such vestry, therefore, must have the care and management of the concerns of the church, and all matters relating thereto; and the question is, whether the power of making church rates be included in those words, and given thereby? Now, there are many concerns of the church, and many matters relating thereto, independent of the making rates for its repairs, and the power of making such, not being expressly given, can only be deemed to be given by inference and implication, if it be given at all. And, accordingly, the argument for the defendants put their case on that ground, and it was urged that the inconvenience of allowing the power to make a rate to exist in a body distinct from the persons who have the care and management of the concerns of the church would be so great that the legislature must be understood to have intended to give that power, by the general words used on this occasion. The court, however, can know the intention of the legislature only from the language of a statute, and is to interpret that language according to the rules and principles of the law. The inconvenience, in this case, does not appear to be greater than that which must take place under the statute 59 Geo. III. c. 12, whereby a select vestry may the appointed for the concerns of the poor, leaving the power of making rates to the persons who be-

[d] Stat. 3 & 4 Vict. c. 60, s. 8.
[e] *Cockburn* v. *Hervey*, 2 Barn. & Ad. 801.

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fore possessed it, that is, to the churchwardens and overseers."

Former select vestrymen to continue for districts where parish has been divided under 3 Geo. 4, c. 72.

Where any parish or place shall be divided into separate parishes, for *ecclesiastical* purposes, or into separate districts or chapelries, in which select vestries shall be appointed by the commissioners, all members of the select vestry of the original church or chapel shall continue to act as the vestry of such district or division, in all matters relating to such church or chapel, *and the repairs thereof*, or to any other ecclesiastical matters or things, or in the distribution of any proportion of any bequests, gifts, or charities which may be assigned to any such district or division; provided that no member of any select vestry shall, after such division, act in any matter relating to any church or chapel, or any other ecclesiastical matters or things, except such as relate to the division in which he shall reside; and if by reason of such division a sufficient number of such members of select vestry shall not remain resident in the division within which the original church or chapel shall be situate, according to the proportion fixed by the commissioners, (regard being had to the population of such division, and its relative population to that of the whole parish or place,) all such deficiencies shall be filled up as vacancies have before been filled up therein; provided that no person shall vote in supplying such deficiencies unless resident within the division for which the members are to be chosen; provided that the persons chosen shall not thereby be members of the vestry for any other purposes than such as relate to the division for which they shall be chosen, or for the distribution of any charitable gifts therein; and provided that all the members of the select vestry of any such parish or place, resident in any other divisions thereof, shall be members of such vestries as shall be appointed under the acts for the divisions in which they shall reside.[f]

It will be observed, that in this last act, in mentioning the duties of a select vestry, the words "repairs thereof" are introduced, which were not in the original statute, by which such select vestries are created; and accordingly this was relied upon, and pressed in argument in the last mentioned case before Lord Tenterden, who in giving judgment in that case observes upon it—"The tenth section of the 3 Geo. IV. c. 72, does certainly afford an argument in favour of the defendants; but it is obvious that this section is confined in terms to the previous existence of a select vestry in the original parish, and it is

But this enactment gives select vestrymen no powers which

[f] 3 Geo. 4, c. 72, s. 10.

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they had not previously.

by no means a necessary consequence that because the legislature thought fit to give the power of making rates (assuming such power to be thereby given) to the select vestry of a new parish, taken out of an old parish wherein a select vestry had that power before, therefore the select vestry of such a new parish shall have that power, where it was not previously vested in a body of the same description in the whole parish, so that the giving of that power in a case like the present can, at most, be considered only as a matter of doubtful, and by no means of necessary or even clear implication."

These select vestries, therefore, for ecclesiastical purposes, do not affect or alter the common law right of the parishioners and churchwardens, in vestry assembled, to tax themselves for the purposes of a church rate; but this question has been already considered under the subject of church rates.

Select vestries by special private acts of parliament.

In several private acts, for building particular churches, provision is made for the appointment of select vestries. In some instances the minister, churchwardens, overseers of the poor, and others, who have served, or paid fines for being excused from serving those offices; in others the minister, churchwardens, overseers of the poor, and all who pay to the poor rate; and there are some in which all who rent houses of so much a year are appointed to be vestrymen within such parishes, and no other persons.

Select vestries under 1 & 2 Will. 4, c. 60.

In the metropolitan, and in some of the larger country parishes, considerable inconvenience was experienced from the large and increasing numbers of the inhabitants who were entitled to be present in and constitute the vestry; and to remedy this inconvenience an act was passed in the year 1831 (generally known as Hobhouse's act), which, in cases where the act has been adopted, makes the vestry a representative body, of whom all rateable inhabitants of the parish are the constituents.

The parishes in which the act may be adopted, the mode of its adoption, the number of vestrymen in each case, according to the amount of the population, the mode of their election, the duration of their office, their qualification and duties, are determined by the act, the material parts of which are as follows.[g]

In what parishes act may be adopted.

The act is applicable to, and may be adopted in all parishes within, or being part of, any city or town, and in any other parishes in which there are more than 800 ratepayers; but it is not to be adopted in other parishes, in

[g] For the following provisions, see the stat. 1 & 2 Will. 4, c. 60.

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which, therefore, the constitution of the vestry remains as before.

How to be adopted.

In parishes where certain of the rate-payers desire that the act shall be adopted, any number, amounting at least to one-fifth of the whole, or to fifty, may sign and deliver a requisition, describing their places of residence to the churchwardens, or to one of them, between the 1st of September and the 1st of March, requiring them to ascertain, according to the manner prescribed by the act, whether the majority of the parishioners wish the provisions of the act to be adopted. On receipt of this requisition, the churchwardens, on the 1st day in March then next ensuing, are to affix a notice on the doors of all churches and chapels within the parish, specifying the day, not earlier than ten, nor later than twenty-one days after the Sunday following the affixing of the notice, and the place where the rate-payers are to vote for or against the adoption of the act.

Who are to be deemed rate-payers.

No person is to be deemed a rate-payer, and entitled to vote, under the provisions of the act, who has not been rated for the whole year preceding, and paid all rates and assessments due from him for that time.

Voting for adoption of the act.

If two-thirds of the votes so given (the whole number of persons voting being a clear majority of the rate-payers) are in favour of adopting the act, the churchwardens are forthwith to give notice of that fact in the London Gazette, and in some newspaper circulating in the county, and by notice affixed to the principal doors of every church or chapel within the parish. But if the rate-payers decide against the adoption of the act, no similar requisition is to be made within three years.

Election of vestrymen.

The act immediately takes effect, and becomes law, in the parish where it has been adopted, for the election of vestrymen and auditors. This election is to be annual, and to take place on some day in May; the day to be fixed, in the first year, by the churchwardens, and afterwards by the vestry. When a ballot is demanded at such election, the same shall commence on the following day; and continue for three successive days, commencing at eight in the forenoon, and closing at four in the afternoon on each day.

Duration of the balloting.

Inspectors of votes.

On the day of annual election for vestrymen and auditors, in any parish adopting this act, each parishioner then rated, and having been rated to the relief of the poor one year, desirous of voting, is to meet at the place appointed for such election, then and there to nominate eight rate-payers of the said parish, as fit and proper

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persons to be inspectors of votes; four of such eight to be nominated by the churchwardens, and the other four to be nominated by the meeting: and, after such nomination, the parishioners are to elect such parishioners duly qualified as may be there proposed for the offices of vestrymen and auditors; and the chairman shall, at such meeting, declare the names of the parishioners who have been elected by a majority of votes at such meeting.

The poll. Ballot.

Any five rate-payers may then and there, in writing or otherwise, demand a poll, which shall be taken by ballot, each rate-payer delivering to the aforesaid inspectors two folded papers, one of which papers shall contain the names of the persons for whom such parishioner may vote as fit and proper to be members of the vestry, and the other shall contain the names of the persons for whom such may vote as fit and proper to be auditors of accounts: provided that each rate-payer shall have one vote, and no more, for the members of the vestry, and one vote, and no more, for the auditors of accounts, to be chosen in the said parish.

This proviso is very important, as, in parishes where the act has been adopted, it repeals the provisions of the former Vestry Act, by which, as we before observed, the right of voting was transferred from persons to property. Under this act, every individual rate-payer has an equal voice in the election, without reference to the amount of property on which he may be rated.

Penalties.

The duties of these inspectors are particularly specified in the act, and penalties are appointed by the act for forging of falsifying any such voting list, or obstructing the election, or making an incorrect return.[h]

Qualification of vestrymen.

The vestry, thus appointed and elected, shall, when the act has come into full operation, consist of resident householders, rated to the poor upon a rental of not less than 10*l.*, in parishes not within the metropolitan police district, or city of London. But in parishes within that district or city, or in other parishes where there are three thousand resident householders, the being rated to the poor, on a rental of not less than 40*l.* per annum, is a necessary qualification.[i]

Number to be not less than twelve, nor more than 120, in different cases.

The number of vestrymen are to be proportioned to the number of householders: thus,—there are to be twelve vestrymen for every parish in which the number of rated householders shall not exceed one thousand; and twelve other additional vestrymen for every parish in which the

[h] Sect. 19. [i] Sect. 26.

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rated householders shall exceed one thousand; and twelve other additional vestrymen for every parish in which the number of rated householders shall exceed two thousand; and so on, at the proportion of twelve additional vestrymen for every thousand rated householders: provided that in no case the number of vestrymen shall exceed one hundred and twenty: but in any parish wherein a greater number of vestrymen are given by special act of parliament, than the proportions aforesaid will amount to, then the number of vestrymen shall remain the same as given by such act of parliament. The rector, district rectors, vicar, perpetual curate, and churchwardens of the said parish, shall constitute a part of the said vestry, and shall vote therein, *in addition to* the vestrymen so as aforesaid elected under this act: provided that no more than one such rector, or other such minister, as aforesaid, from any one parish or ecclesiastical district, as aforesaid, shall, *ex officio*, be a part of, or vote at, any vestry meeting.[k]

With the clergyman.

At the first election for vestrymen, after the adoption of this act in any parish, one-third of the then existing vestry, or the nearest number thereto, but not exceeding the same, shall retire from office (such portion to be determined by lot), and the parishioners duly qualified shall elect a number of vestrymen, equal to one-third of the vestry, to be chosen according to the provisions of this act; and on the next ensuing annual election for vestrymen, one-half, or as nearly as may be one-half of the remaining part of the first aforesaid vestry, shall retire from office (such portion to be determined by lot), and the parishioners duly qualified shall again elect a number of vestrymen equal to one-third of the vestry, to be chosen according to the provisions of this act; and on the next annual election for vestrymen, the last remaining portion of the old vestry shall retire from office, and the parishioners duly qualified shall elect vestrymen, in like manner and number as at the two preceding elections; so as to fill up the vestry to the exact number of vestrymen prescribed by this act.[l]

Proportion of existing vestry to retire at each of the three first elections under the act.

At every subsequent annual election, those vestrymen who have been three years in office shall go out of office; and the parishioners shall elect, according to the provisions of this act, other vestrymen to the number of one-third of the total number of which such vestry shall consist; as also fill up any vacancies which may have occurred from death or other causes: provided that any,

Vestrymen to quit office after three years.

[k] Sect. 23. [l] Sect. 24.

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or all, of the vestrymen so going out by rotation may be immediately eligible for re-election.

Case in the Queen's Bench, interpreting the meaning of the act as to the old and the new vestry.

With regard to these last provisions, it has been determined by the Court of Queen's Bench,[m]—1. That where the act has been adopted in a parish, there must be elected, at each of the first three annual elections, one-third of the whole number of which the vestry, chosen under the act, is ultimately to consist; and there must be deducted, by lot, from the original vestry, at the first election, one third of the number of vestrymen then existing (whatever the full regular number of the original vestry would be); at the second election, half the number of the original vestrymen then existing; at the third election, all the remaining original vestrymen.

As to divisions in parishes.

2. A parish adopting the act had previously been divided into four districts, for the more conveniently collecting the rates, and this division had been adopted for taking the poll in the election of members of parliament; a small part also of the parish was annexed to a part of an adjoining parish, and separated from the original parish for ecclesiastical purposes: held, that the election of vestrymen and auditors might be made in one place of the parish only.

As to qualification of the vestrymen.

3. If a parish, adopting the act, be within the metropolitan police district, or the city of London, or contain more than three thousand resident householders, the qualification for vestrymen is, that they should be resident householders, and should also be rated to the poor rate of the parish, on an annual rental of not less than 40*l.*; but the rental may be made up of tenements separately held, and not in the occupation of the vestrymen.

4. The qualification must be perfect at the time of election; but if unqualified persons be elected, this does not avoid the election of qualified vestrymen or auditors, elected at the same time.

As to oaths prescribed by a former local act.

5. A parish which adopted the act had previously been governed by a vestry established by a local act, which defined the qualification of a vestryman, and prescribed an oath to be taken before any vestryman should be capable of acting in the execution of that local act. By the oath, the person swore to execute the powers reposed in pursuance of the same, and that he was possessed of the qualification prescribed thereby, which was different from that required by 1 & 2 Will. IV. c. 60. Held, that this oath was not to be taken by the vestrymen elected under the latter act.

[m] *R. v. St. Pancras*, ante.

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The vestry thus constituted is to exercise the powers and privileges held by any vestry existing in such parish at the time of the passing of the act, and its authority may be pleaded in regard to all parochial property, or monies due, or holdings, or contracts, or other documents of the like nature, formerly under the control of the said vestry; and all parish officers or boards shall account to them, in like manner as they have accounted to the said vestry.[n] Power and authority of the vestry.

The number of vestrymen present who are sufficient to constitute a quorum in each case, are as follows:—Five, where the vestry consists of not less than twelve, nor more than twenty-three vestrymen. Number constituting a quorum.

Seven, where the vestry consists of not less than twenty-four, nor more than thirty-five vestrymen.

Nine, where the vestry consists of thirty-six vestrymen, or any number upwards; and if acts done by them are confirmed at the next subsequent meeting of the vestry, they are valid and binding.[o]

In any case in which the vestry room of any parish, in any city or town, shall not be sufficiently large and commodious for any vestry meeting, such meeting shall be held elsewhere, within the said parish or place, but not in the church or chapel thereof.[p] Meetings not to be held in the church.

The right of the minister of the parish to be the chairman in vestry is not affected by this act; for it is declared that at every meeting of any vestry, in the absence of the persons authorised by law or custom to take the chair, the members present shall elect a chairman for the occasion before proceeding to other business; and the person authorised by law and custom to take the chair, as we have already clearly seen, is the minister. Right of minister to be chairman.

The proceedings of the vestry, and the names of the vestrymen attending, and also a regular account of all sums received or expended on account of parochial purposes, and of the matters for which they have been expended, are to be entered in certain books provided for such purposes, which books are to be open to inspection, and copies or extracts may be taken of or from any thing contained in them, without fee or reward.[q]

The act further provides that, in every parish where it is adopted, five rate-payers shall be chosen as auditors of accounts. The qualification of these auditors is the same as that of the vestrymen, but no person can act as auditor and vestryman at the same time, nor can any one act as auditor, who is interested in any way, directly or indi- Auditors.

[n] Sect. 27. [o] Sect. 28. [p] Sect. 29. [q] Sects. 31, 32.

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rectly, in any contract, office, business, or employ for the parish in which he is to serve; but the various duties appointed for these auditors do not appear to call for particular notice in this work.

List of charities.

The vestry is to cause, once a year, a list to be made out of all estates and charitable foundations in the parish, under the control of the vestry. Such list is to contain all particulars relating to such estates or foundations, and is to be open to the inspection of the rate-payers, with the accounts, when audited, at the office of the vestry clerk.[r]

Saving to ecclesiastical jurisdiction.

Nothing contained in the act is to extend to invalidate or avoid any ecclesiastical law or constitution of the Church of England, except so far as concerns the *appointment* of vestries; or to destroy any rights or powers of archbishops, bishops, deans, or other clergy, either as individuals or corporate bodies, or in any way to abridge or control their ordinary jurisdiction over any matter or thing respecting the ministers thereof.

CHAPTER II.

OF UNION WORKHOUSES, AND THE OFFICE OF CHAPLAINS THEREIN.

The subject of importance to clergy.

THE recent alteration of the laws affecting the management of the poor, and the general establishment of union workhouses throughout the country, has occasioned a new office among the clergy in the chaplains appointed for the religious instruction of the pauper inmates of such houses; and the subject is practically of importance, not only to those clergymen who may be appointed to such offices, but incidentally in a variety of ways to the incumbents of those parishes in which the union workhouses are situated.

Powers of Poor Law Commissioners.

The act by which unions for the maintenance of the poor were established[s] provided, first, for the appointment of the poor law commissioners, and authorised them, *inter alia*, from time to time to make and issue such rules, orders and regulations for the government of workhouses and the education of the children therein, and for carrying the act into execution in all other respects, as they should think proper, and further authorised them, at their

[r] Sect. 39. [s] 4 & 5 Will. 4, c. 76.

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discretion, to suspend, alter, or rescind such rules, orders, and regulations.[t]

Paupers in workhouse not obliged to attend religious worship contrary to their principles.

It was also declared that no rules, orders or regulations of the commissioners, nor any bye-laws then in force, or to be thereafter made, should oblige any inmate of any workhouse to attend any religious service which might be celebrated in a mode contrary to the religious principles of such inmate, nor should authorise the education of any child in such workhouse in any religious creed other than that professed by the parents or surviving parent of such child, and to which such parents or parent should object, or, in the case of an orphan, to which the godfather or godmother of such orphan should so object: provided also, that it should be lawful for any licensed minister of the religious persuasion of any inmate of such workhouse, at all times in the day, on the request of such inmate, to visit such workhouse for the purpose of affording religious assistance to such inmate, and also for the purpose of instructing his child or children in the principles of their religion.[u]

Children of Dissenters.

Provisions of the act under which chaplains have been appointed.

It was also further declared that the commissioners might direct the guardians of the union to appoint such paid officers, with such qualifications, as the commissioners should think proper, for superintending or assisting in the administration of the relief and employment of the poor, and otherwise carrying the provisions of the act into execution; and the commissioners were empowered to define, specify and direct the execution of the respective duties of such officers, and the places and limits within which the same should be performed, and to direct the mode of appointment and determine the continuance in office and the dismissal of such officers. And by the interpretation clause of the same act it was declared that the word "officer" should be construed to extend, among others, to any clergyman.[x]

Doubts as to the power of appointing chaplains.

Upon these provisions of the act it was at first considered doubtful whether the guardians were empowered to appoint, or the poor law commissioners to enforce the appointment of chaplains in union workhouses, but this question, as we shall see, has since that time been judicially determined.

First recommendation of the commissioners as to appointing chaplains.

The boards of guardians were, however, recommended by the commissioners to appoint a clergyman of the Established Church as chaplain for the workhouse; the commissioners stating that although it did not appear in-

[t] Sect. 15. [u] Sect. 19. [x] See sects. 46 and 109.

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dispensable that a chaplain should be appointed in every union workhouse, yet they recommended that in every case there should be some person appointed and paid as such, in order that he might acquire a right and take the responsibility of giving aid and instruction to the sick, and of superintending the religious instruction of the children who were educated in the workhouse, and that the incumbent of the parish might well undertake such duties at a moderate stipend; and in a circular letter the duties of such a chaplain were generally defined to be the superintendence of the moral and religious state of the inmates generally, the direction of the religious instruction of the children, and the administration of spiritual consolation and comfort to the aged, infirm, and sick.

General and particular rules.

It may here be observed, that all general rules made by the commissioners (general rules being such as are directed to and affect more than one union) must be submitted to one of the secretaries of state in the manner directed by the act before they come into operation. Other rules, affecting particular unions, need not be so submitted in order to give them validity; and all rules, orders and regulations from time to time made by the commissioners under the authority of the act, are declared to be valid and binding, and are to be obeyed and observed as if they were specifically made and embodied in the act.

Acting upon this power, the commissioners, at an early period, issued the following orders, to be observed in one of the unions first formed, and intended to be a direction to others.[7]

"No person shall be allowed to visit any pauper in the workhouse, except by permission of the master and subject to such conditions and restrictions as the board of guardians may direct: provided that the interview shall always take place in the presence of the master or matron, and in a room separate from the other inmates of the workhouse, unless in case of sickness: provided also, that any licensed minister of the religious persuasion of any inmate of such workhouse, at all times of the day, on the request of such inmate, may visit such workhouse for the purpose of affording religious assistance to such inmate, and also at all reasonable times for the purpose of instructing his child or children in the principles of their religion, such religious assistance and such instruction being strictly confined to inmates who are of the religious persuasion of such licensed minister, and to the children

Arrangement for religious instruction by dissenting ministers in workhouses.

[7] Instructions of poor law commissioners to guardians of the Abingdon union.

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of such inmates, and not so as to interfere with the good order and discipline of the other inmates of the establishment."[a]

Divine service for persons not dissenters.

Divine service shall be performed every Sunday in the workhouse, at which all the paupers shall attend, except the sick and the young children, and such as are too infirm to do so; and except also those paupers who may object so to attend on account of their professing religious principles differing from those of the Church of England.[a]

The first of these rules was in pursuance of that clause of the act which provided that any licensed minister of the religious persuasion of any inmate might visit the workhouses at all times of the day at the request of such inmate, to afford him religious instruction, and to instruct his children in religion. Questions as to the effect of this provision were submitted to the solicitor-general by the guardians of the Dunmow union, and the following opinion was returned by him, which confirms in substance the legality of the above-mentioned rule of the commissioners as to this matter.

Definition and restriction of the duties of a dissenting minister in workhouses.

"I am of opinion that any licensed minister may, upon the request of any inmate or inmates of the Dunmow union workhouse, being of the same religious persuasion as himself, visit the workhouse, and there give religious instruction, by reading or preaching, or offering up prayers; and that such instruction may be given, either individually or collectively, to the persons who have so requested his assistance, or to any of their children. It seems to me quite clear that the act does not authorise him to give any such instruction to persons not of his own religious persuasion, nor to inmates who have not requested his attendance."[b]

Doubts as to the necessity of bishop's license in case of chaplain and of workhouse.

When the recommendations of the commissioners as to the appointment of chaplain were generally attended to, it became a question whether it was not requisite that some part of the workhouse should be consecrated to sanction a clergyman of the Established Church in performing the duties required to be performed by the chaplain;—whether it was necessary that he should be licensed thereto by the diocesan; and whether the consent of the incumbent of the parish in which the union was situate was essential; and whether, if the incumbent or curate of the parish was the chaplain, a license from the diocesan was still requisite.—Upon these questions the following opinion in substance was returned by Dr. Addams.

Opinion of Dr. Addams.

"With the bishop's license, it is not necessary that any

[a] The 23rd article of orders to be observed in workhouse of Abingdon union.
[b] 25th article. [b] Sir R. M. Rolfe, Solicitor-General, 1838.

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part of the workhouse should be consecrated to sanction a clergyman of the establishment in the performance of any of the duties required of him. Seeing that these chaplains are required to preach, pray and administer the Communion regularly, I am of opinion that the chaplains of those workhouses are required to perform divine service, and consequently that, strictly speaking, the bishop's license is necessary. For, strictly speaking, no minister is authorised to serve, *i. e.* to perform divine service in any diocese, without the license of the diocesan. I think, strictly speaking, that the consent of the incumbent, in whose parish the workhouse is situate, is also necessary; for as no minister of the establishment can officiate, strictly speaking, in any diocese without the license of the diocesan, so neither, in strictness, can he in any parish without the consent of the incumbent. I think, too, that the bishop's license may be necessary, in strictness, even though the incumbent or curate of the parish in which the workhouse is situate be the chaplain."[c]

Power of commissioners to appoint chaplain confirmed by Court of Queen's Bench.

The power of the commissioners to enforce the appointment of a chaplain, where the guardians were reluctant to appoint, and contrary to their expressed opinion, was not fully acquiesced in until it was established by the following case:

The commissioners had ordered the guardians of the Braintree union in Essex to appoint and to report the same to them, with the amount of salary, &c., in order that the same might be confirmed or disallowed by them; and the writ commanded the guardians to obey such order, or to show cause to the contrary. The return to the writ stated that the majority of the inmates of the workhouse were dissenters; that dissenting ministers attended the workhouse voluntarily; and, therefore, that in the exercise of their judgment and discretion, they did not think it necessary to appoint a chaplain.

In support of the return, it was argued, that clergymen did not come within the description of officers under the 46th section; and that if there was nothing out of that section to which the word clergyman in the interpretation could apply, the court would rather suppose the word incautiously adopted than admit the imposition of a tax without sufficient words to warrant it; upon which Coleride, J. observes: "As to the word being introduced by negligence, it seems probable that the office of a clergyman

[c] In the case of a new office, as that of chaplains to workhouses, where the law has to be built up gradually, the insertion of the several opinions mentioned in the text, in the absence of any positive *lex scripta*, may be found useful.

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was in contemplation when this act was framed, which removes persons from the neighbourhood of their proper spiritual instructors to a place where instruction may be deficient under the new state of things, and where, if the commissioners cannot appoint a chaplain, the guardians cannot."

It was further urged, that it was inexpedient that this power should be exercised in London by commissioners who personally knew nothing of the union, without any reference to the discretion of the guardians, who were acquainted with the opinions and religious persuasions of the inmates, and that the commissioners might direct the appointment of any minister, even although his religious belief were totally different from the inhabitants; as, for instance, that a Roman Catholic might be appointed, the term clergyman being often applied to ministers of other persuasions than that of the Church of England.

Lord Denman said, it is true that no provision is to be found in the act in question directly authorising the appointment of a chaplain, or even using the word "chaplain," or any word of a similar import; but the 19th section plainly shows the intention of the legislature that the inmates of the union workhouse, of whatever religious persuasion, should have religious assistance from ministers of their own persuasion; it shows, moreover, that some general regulations for affording such assistance to the inmates were intended, as well as some exceptions and particular regulations in favour of those who dissented, and could not conscientiously reap the benefit of those general regulations. Then the 42d section, giving power to the commissioners to make rules and regulations for the government of workhouses, makes it further incumbent upon them to carry into effect the intentions of the legislature, as shown in the 19th section. Neither were chaplains of workhouses unknown to the law; for many local acts of parliament contain express provisions respecting their appointment. We have no doubt that the religious instruction of the inmates was intended to be involved in the management of the workhouse, and that the legislature actually intended to give a general power to appoint chaplains, as it found that power existing in numerous parishes already. And a peremptory mandamus was consequently awarded.[d]

Present code of rules as to the chaplains, and

When by means of different decisions the law, as regarded union workhouses, and the appointment and duties

[d] *The Queen* v. *The Guardians of the Poor of the Braintree Union*, 1 Queen's Bench Reports, 130.

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their duties and religious instruction.

of the officers, came to be better understood, the poor law commissioners, in pursuance of the authority given them by the act, rescinded so much of every order before issued by them as related to the government of the workhouse, or to the powers and duties of the officers employed in them, except only so far as any of such orders might have authorised the appointment of the then existing officers; and in their stead issued a number of rules or articles, which, having been approved as directed by the act, have consequently all the force and effect of law. These, therefore, constitute the code by which union workhouses are for the future to be regulated. Such of them, therefore, as relate to the chaplain and the religious instruction of the paupers are here inserted, and are as follows:

Children.

Article 22. The boys and girls who are inmates of the workhouse shall, for three of the working hours at least every day, be respectively instructed in reading, writing, arithmetic and the principles of the Christian religion; and such other instruction shall be imparted to them as shall fit them for service, and train them to habits of usefulness, industry, and virtue.

Instruction by dissenting minister confined to those of his own persuasion.

Article 29. Any licensed minister of the religious persuasion of any inmate of the workhouse, who shall at any time in the day, on the request of any inmate, enter the workhouse for the purpose of affording religious assistance to him, or for the purpose of instructing his child or children in the principles of his religion, shall give such assistance or instruction, so as not to interfere with the good order and discipline of the other inmates of the workhouse; and such religious assistance or instruction shall be strictly confined to inmates who are of the religious persuasion of such minister, and to the children of such inmates, except in the case in which the board of guardians may lawfully permit religious assistance and instruction to be given to any paupers who are Protestant dissenters by licensed ministers who are Protestant dissenters.

Exception.

Prayers and divine service and attendance thereat.

Article 31. Prayers shall be read before breakfast and after supper every day, and divine service shall be performed every Sunday in the workhouse (unless the guardians, with the consent of the poor law commissioners, shall otherwise direct), at which all the paupers shall attend, except the sick, persons of unsound mind, the young children, and such as are too infirm to do so; provided that those paupers who may object so to attend on account of their professing religious principles differing from those of the Church of England, shall also be exempt from such attendance.

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Article 32. The guardians may make such regulations as they deem expedient to authorise any inmate of the workhouse, being a member of the Established Church, and not being an able-bodied female pauper having an illegitimate child, to attend public worship at a parish church or chapel, on every Sunday, Christmas Day, and Good Friday, under the control and inspection of the master or porter of the workhouse, or other officer. Inmates in certain cases may attend parish church.

Article 33. The guardians may also make such regulations as they deem expedient to authorise any inmate of the workhouse, being a dissenter from the Established Church, and not being an able-bodied female pauper having an illegitimate child, to attend public worship at any dissenting chapel in the neighbourhood of the workhouse, on every Sunday, Christmas Day and Good Friday. Or if dissenters, a dissenting chapel.

Article 34. Any pauper who shall use profane language, or misbehave at prayers in the workhouse, or wilfully disobey any lawful order of any officer of the workhouse, shall be deemed disorderly. Misbehaviour at prayers.

Article 35. Any pauper repeating any of the above offences within seven days, or committing more than one of such offences, or who shall, by word or deed, insult or revile any officer of the workhouse, or who shall wilfully disturb the other inmates during prayers or divine worship, shall be deemed refractory. Disturbing inmates during prayers.

Article 56, provides for the appointment of a visiting committee, who are from time to time to give such answers as the facts may warrant to certain queries printed in the visitors' book, kept in the workhouse for that purpose, and to be submitted regularly to the board of guardians at their ordinary meetings. Among these queries are found the following: Visiting committee, their book.

Is divine service regularly performed?

Are prayers regularly read?

Article 76. The following are to be the duties of the chaplain. Specific duties of the chaplain.

No. 1. To read prayers and preach a sermon to the paupers, and other inmates of the workhouse, on every Sunday, unless the guardians, with the consent of the poor law commissioners, shall otherwise direct, and to read prayers to them on every Good Friday and Christmas Day. Prayers and preaching.

No. 2. To examine the children, and catechise such as belong to the Church of England, at least, once in every month; and to make a record of the same, and state the dates of his attendance, the general progress and condition of the children, and the moral and religious state of With respect to the children.

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the inmates generally, in a book to be kept for that purpose, to be laid before the board of guardians at their next ordinary meeting, and to be termed the chaplain's report.

The sick.

No. 3. To visit the sick paupers, and to administer religious consolation to them in the workhouse, when applied to for that purpose by the master or matron.

Article 74. Among the duties of the master is the following:

Master's duty in reading prayers.

In the absence of the chaplain to read prayers, or cause them to be read before breakfast, and after supper, every day in the workhouse; unless the poor law commissioners direct otherwise, at which all the paupers shall attend, except the sick, persons of unsound mind, young children, and those who are too infirm to do so. Those who may decline to attend on account of professing different opinions from the Church of England are to be exempted.

CHAPTER III.

OF DISSENTERS FROM THE ESTABLISHED CHURCH, AND OF THE LAWS AFFECTING THEM.[a]

The present subject is one of much importance to the clergy in the discharge of their parochial duties. In those parishes where a portion of the population dissents from the doctrine of the Established Church, the dissenting ministers and their followers must of necessity, to a considerable extent, be opposed to the clergyman and his congregation, in various ecclesiastical matters; and it is most desirable for the latter to know the peculiar rights and privileges which belong to those who are for the most part exempt from his control and interference.

There are two classes of persons not conforming to the rites and ordinances of the Church of England, who, in times past, have been very differently regarded by our laws; Roman Catholics and Protestant Dissenters: but at present there is little difference in their position, as regards the Established Church.

History of the severe laws against papists.

At the time when Blackstone wrote, he seems almost ashamed of the severity of those laws against Roman Catholics which he had been enumerating, and, in conclu-

[a] For much of the analysis of statutes and the cases mentioned in this chapter the author is indebted to Mr. Clive's recent edition of Steer's Parish Law.

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sion, appears to think it necessary to enter into the following apology.[b]

This, he says, is a short summary of the laws against the papists. Of which the president Montesquieu observes, that they are so rigorous, though not professedly of the sanguinary kind, that they do all the hurt that can possibly be done in cold blood. But in answer to this it may be observed (what foreigners, who only judge from our statute-book, are not fully apprised of), that these laws are seldom exerted to their utmost rigour; and indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the Jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the Queen of Scots, obliged the parliament to counteract so dangerous a spirit, by laws of a great, and then perhaps necessary, severity. The powder treason, in the succeeding reign, struck a panic into James I., which operated in different ways: it occasioned the enacting of new laws against the papists, but deterred him from putting them in execution. The intrigues of Queen Henrietta in the reign of Charles I., the prospect of a popish successor in that of Charles II., the assassination plot in the reign of King William, and the avowed claim of a popish pretender to the crown, in that and subsequent reigns, will account for the extension of these penalties at those several periods of our history. But if a time should ever arrive (and perhaps it is not very distant) when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous and despicable, not only in England, but in every kingdom of Europe, it probably would not then be amiss to review and soften these rigorous edicts; at least, till the civil principles of the Roman Catholics called again upon the legislature to renew them; for it ought not to be left in the breast of every merciless bigot, to drag down the vengeance of these occasional laws upon inoffensive though mistaken subjects, in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

Roman Catholics exempt

The time contemplated in this passage, when the fears of a pretender shall have vanished, has long since arrived,

[b] 4 Bla. Com. 56.

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from civil disabilities.

though the power and influence of the pope, if not in England, yet in most of the kingdoms of Europe, has become stronger rather than more despicable since that time. All those laws enumerated by Blackstone, and which called for an apology from him, and for the reprobation of Montesquieu, have been now repealed.[c] The laws, therefore, which formerly affected them, are now become matter of history; and it may be sufficient here to state, that, by a succession of enactments, Roman Catholics have been relieved from all civil disabilities, and are in the same position as other subjects in all civil matters; and that, upon taking and subscribing certain oaths, they are eligible to all civil offices and employments, except those of regent, lord chancellor, lord keeper, or commissioner of the great seal, lord lieutenant of Ireland, or high commissioner of the general assembly of Scotland.[d]

How affected as to matters ecclesiastical.

Thus, they enjoy equal privileges and toleration with other Protestant subjects, in all civil matters. But while equal rights and privileges with the other Protestant subjects have been allowed them in all civil matters, it would have been unreasonable to have allowed them to interfere in those matters which affect our ecclesiastical establishment. Blackstone says, in speaking of them in his time, that while they acknowledged a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects. It is impossible to overlook the truth of this remark as it bears upon matters ecclesiastical, in which they are especially bound to obey a foreign superior; for in this respect they differ from Protestant dissenters, who are content to deny the authority of our ecclesiastical persons or officers, without looking to a foreign authority for their guidance.

Restrictions under which they are placed.

The restrictions to which they are still subjected, as to matters ecclesiastical, may be considered as of two kinds, first, those which restrain them from interference with the Established Church; and, second, those by which the exercise of their own religion is restrained.

As to interference with the Established Church.

Accordingly, the act by which they are relieved from civil disabilities does not extend to authorise or empower them to present to any living: in which respect they are under the disability before alluded to in speaking of advowsons; nor does it empower them, being members of any lay corporation, to give any vote at or in any manner to join in the election, presentation or appointment of any person to any ecclesiastical benefice whatsoever, or any

As to rights of patronage.

[c] See 7 & 8 Vict. c. 102. [d] 10 Geo. 4, c. 7.

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office or place connected with or belonging to the Church of England and Ireland, or the Church of Scotland, which may be in the patronage of such lay corporation. Neither are they by that act enabled to hold any office in or belonging to the Church of England or Ireland, or the Church of Scotland, or in any ecclesiastical court, or in any court belonging to any ecclesiastical foundation; or any office or place whatever in or belonging to the universities; or in colleges or halls of the universities; or the Colleges of Eton, Westminster, or Winchester; or any college or school within this realm. Neither does the act repeal or interfere with any local statute, ordinance or rule, established by competent authority, within any university, college, hall or school, by which Roman Catholics are prevented from being admitted thereto, or from residing or taking degrees therein.[e]

The universities.

The effect of the statutes of the University of Oxford is, that no Roman Catholic could be admitted even as an undergraduate, so as to profit in any manner from the instruction offered by the university; as the declaration of orthodoxy is there required at the time of matriculation. The effect of the statutes of the University of Cambridge is, that no Roman Catholic could be admitted to take his degree there, although he might have been admitted and resided there as an undergraduate. In neither of the universities are the fellowships, or any of the endowments, either of the university or of the several colleges, open to them.

Presentation to benefices.

Neither does the act enable any person, otherwise than as he was by law enabled before the passing thereof, to exercise any right of presentation to any ecclesiastical benefice, nor does it extend to repeal, vary or alter in any manner the laws then in force, in respect to the right of presentation to any ecclesiastical benefice.

By the laws, therefore, which were at that time, and which are consequently now in force, Roman Catholics are disabled from presenting to any benefice, and every presentation made by them is wholly void to all intents and purposes; and lest this enactment should, as indeed it easily might be, evaded, it is declared[f] that every grant made of any advowson, or right of presentation, collation, nomination or donation to any benefice, by any person professing the Roman Catholic religion, or by any mortgagee, or trustee of such person, shall in the same manner be null and void, unless it be for valuable consideration to a Protestant purchaser.

[e] 10 Geo. 4, c. 7. [f] 11 Geo. 2, c. 17, s. 5.

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Such presentations to benefices as devolve upon, and the right to which becomes exciseable by Roman Catholics, are given to the chancellor and scholars of the Universities of Oxford and Cambridge; and by arrangement between those bodies, the presentation to all such livings as are situated south of the Trent belong to Oxford, and those situated to the north of that river belong to Cambridge.[g]

By the same statute the trustees of Roman Catholics are alike disabled from presenting, which we have already seen they are more fully prevented from doing by succeeding statutes; and not only would presentations made by them be void, but by presenting without giving notice to the Vice-Chancellor of the University to whom the presentation shall belong, within three months after the avoidance, they become liable to a penalty of five hundred pounds.

Where any right of presentation to any ecclesiastical benefice shall belong to any office in the gift or appointment of the crown, which office shall be held by a Roman Catholic, the right of presentation shall devolve upon and be exercised by the Archbishop of Canterbury for the time being.[h]

No Roman Catholic is allowed, directly or indirectly, to advise the crown, or the regent, or the lord lieutenant, or lord deputy, or other chief governor of Ireland, touching or concerning any appointment to, or disposal of any office or preferment in the Church of England or Ireland, or in the Church of Scotland; and any person so offending is guilty of a high misdemeanor, and disabled from ever holding any office, civil or military, under the crown.[i]

Restrictions as to the exercise of their own religion.

Roman Catholics are further restrained in the exercise of their own religion, and in several matters appertaining thereto, which might interfere with, and directly or indirectly be injurious to, the Church of England. For this reason they are restricted from making open show and parade of their religion, and from assuming openly for their ecclesiastical offices, such titles and dignities as might seem to place their religion in a position of rivalry to the Established Church. Thus the stat. 10 Geo. IV. c. 7, after reciting that the right and title of archbishops to their respective provinces, of bishops to their sees, and of deans to their deaneries, as well in England as in Ireland, have been settled and established by law, enacts, that if any person, other than the person thereto authorised by law,

[g] 1 Will. & Mary, sess. 1, c. 26; Cruise's Dig. tit. Advowson, and see ante.
[h] Ibid. s. 24.
[i] Ibid.

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shall assume, or use, the name, style, or title of archbishop of any province, bishop of any bishopric, or dean of any deanery in England or Ireland, he shall for every such offence forfeit and pay the sum of one hundred pounds.

If any person, holding any judicial or civil corporate office, shall be present at any place or public meeting for religious worship in England or in Ireland other than that of the united Church of England and Ireland; or in Scotland, other than that of the Church of Scotland; in the robe, gown or other peculiar habit of his office, or attend with the ensign or insignia, or any part thereof, of or belonging to such his office, such person shall, upon conviction, forfeit such office, and pay for every such offence the sum of one hundred pounds.[j]

And if any Roman Catholic ecclesiastic, or any member of any of their orders, communities, or societies, shall exercise any of the rites or ceremonies of the Roman Catholic religion, or wear the habits of his order, save within the usual places of worship of the Roman Catholic religion, or in private houses, such ecclesiastic or other person shall, upon conviction, forfeit for every such offence the sum of fifty pounds.[k]

Their religious orders.

Again, their religious orders, whose especial business and duty it is to make proselytes to their own form of religion, are suppressed, or only allowed to reside here under certain restrictions. The 28th section of the same statute enacts, that every Jesuit, and every member of any other religious order of the Church of Rome, bound by monastic vows, being within the united kingdom, shall, within six months after the commencement of the act, deliver to the clerk of the peace, or his deputy for the county wherein he resides, a statement of which the form is given, and which contains the date of the time of the registry, the name and age of the party, his place of birth, the order, &c. to which he belongs, the name and usual place of residence of the next immediate superior of the order, and the usual place of his residence. This statement is to be registered by the clerk of the peace, or his deputy, and a copy of it is to be forthwith transmitted by him to the chief secretary of the lord lieutenant, or other chief governor of Ireland, if the party resides in Ireland; or if in Great Britain, to one of the principal secretaries of state. And if any such person shall omit so to do, he shall forfeit to the crown for every calendar month, during which he shall remain in the united kingdom, the sum of fifty pounds.[l]

[j] 10 Geo. 4, c. 7, s. 25. [k] Sect. 26. [l] Sect. 28.

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If any Jesuit, or member of such religious order as before mentioned, shall come into this realm, he shall be deemed guilty of a misdemeanor, and being convicted thereof, shall be banished from the united kingdom for the term of his natural life.[m]

But every natural born subject, being at the time of passing of the act a Jesuit, or a member of such religious order as aforesaid, and being at such time out of the realm, may return here; provided that upon his return, or within six calendar months after so returning, he delivers such statement as before mentioned to the clerk of the peace of the place or county where he resides, or to his deputy, for the purpose of being so registered, and transmitted as before mentioned; and in case of his neglect or refusal so to do, he shall forfeit for every calendar month, while he remains in the kingdom without having delivered such notice, the sum of fifty pounds.[n]

Licenses to reside may be granted to them.

The principal secretaries of state may, nevertheless, grant licenses to Jesuits, and such persons as before mentioned, to come into the kingdom for any such space of time as they may think proper, not exceeding six calendar months, and they may also revoke such licenses at any time they may think proper; and any person whose term of license has expired, or whose license has been revoked, and not departing within twenty days, is deemed guilty of a misdemeanor, and being convicted thereof, may be banished the kingdom for the term of his natural life.

An account of all such licenses as have been granted during the twelve months next preceding is to be annually laid before parliament.

Penalty on admitting to their order.

If any Jesuit, or member of a religious order, should admit any person to become a regular ecclesiastic, or member of a religious order, or should aid and consent thereto, or should administer or cause to be administered any oath, vow, &c., intended to bind the person taking the same, to the rules of any such religious order, he is to be deemed guilty of a misdemeanor; and in Scotland is to be punished by fine and imprisonment. And any person so admitted, or becoming a Jesuit, or member of such religious order as aforesaid, shall be deemed guilty of a misdemeanor, and banished the kingdom for the term of his natural life.[o]

And if any person thus ordered to be banished shall not depart the kingdom within thirty days after the pronouncing such order, it shall be lawful for her majesty to order

[m] Sect. 29. [n] Sect. 30. [o] Sects. 33, 34.

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such person to be conveyed to such place, as with the advice of her privy council she shall direct. And any offender so sentenced, and ordered to be banished as aforesaid, who shall after the end of three calendar months, from the time such order shall have been pronounced, be at large in any part of the united kingdom without some lawful cause, on being thereof lawfully convicted, shall be transported to such place as her majesty shall appoint for the term of his natural life.[p]

Females excepted.

Nothing in the act extends in any manner to affect any religious society of females, nor in any manner to affect the statute 5 Geo. IV. c. 25, which provides for the burial of persons dissenting from the Established Church in Ireland, and which has been before mentioned under the subject of burials.

All penalties imposed by the act are to be recovered as a debt due to the crown, by information, to be filed by the attorney-general for England or Ireland, as the case may be, in the Exchequer Courts of England or Ireland, or in the name of the advocate-general in the Court of Exchequer in Scotland.[q]

Protestant dissenters.

In speaking of Protestant dissenters from the Church of England, we follow the same course as in speaking of Roman Catholics; and avoid altogether the entering into those civil disabilities, to which, in former times, they have been subjected, but which now no longer exist. And, at the present day, it may be stated generally that, in their civil rights and capacities, dissenters from the established religion are upon precisely the same footing as all other subjects of the realm.

It has been frequently declared in the senate, and from the judgment seat, that Christianity is part and parcel of the law of the land.[r] But this proposition has no reference to any individual creed, nor does it embrace any particular system of worship to the exclusion of all others. The Christianity here represented as interwoven with the constitution is the comprehensive scheme of moral discipline and improvement, enforced by the belief of an accountability hereafter, for the promulgation and support of which the state exerts its vigilance and pledges its authority.[s]

Origin of sectarianism.

For several centuries after the Christian religion had been established in Great Britain, no division among its followers into separate sects existed; and the law, there-

p Sects. 35, 36. q Sect. 38.
r *R.* v. *Taylor*, 3 Keb. 607; *R.* v. *Woolston*, 2 Stran. 834.
s Steer's Parish Law, 174.

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fore, knew nothing of different denominations; but when a spirit of inquiry led to a conviction that the dogmas and practices of Popery were not warranted by the sacred volume, from whence they were professedly drawn, and the eye of patriotism saw they were equally inimical to civil liberty, a new system was formed, to which the patronage of the state was transferred; and the faith which had so long predominated was abandoned and proscribed. It was then that the statute-book began to teem with penal enactments and civil disabilities, in restraint of the liberty of conscience; some of them, doubtless, expedient for the safety of the government, and the triumph of the reformed Church; perhaps, also, provoked by the machinations of those against whom they were directed: but others, originating in an overweening self-confidence, which, having asserted the right of private judgment for itself, denied it to others, because, as it was practically alleged, all others must come to the same conclusions, or, at least, ought to do so; and, therefore, it was either unnecessary or dangerous to allow them the exercise of this privilege. The futility of attempts to force the consciences of men, and the vindication of the law of the land from this imputation, in contradistinction to the statute-law, cannot be more eloquently expressed than by Lord Mansfield, when delivering his judgment in the House of Lords, upon the question, whether a person elected to a corporate office might plead, in excuse of the fine for refusing to serve, that he was a dissenter, and could not conscientiously take the statement as required by the statute.[t]

General manner in which nonconformity is regarded by our laws.

In civil matters.

And this judgment of Lord Mansfield, which is above alluded to, seems to be the standard to which, in subsequent times, all lawyers have appealed, as showing the true, legal, and, at the same time, the enlightened principles upon which dissenters are to be treated.

"Conscience," he says, "is not controllable by human laws; nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction; and are only calculated to make hypocrites or martyrs. My lords, there never was a single instance, from the Saxon times down to our own, in which a man was ever punished for erroneous opinions, concerning rites, or modes of worship, but upon some positive law. The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. For

[t] See Appendix to Furneaux's Letters to Mr. Justice Blackstone, second edition. Steer's Parish Law, 174. The case alluded to is *Allen Evans* v. *Chamberlain of London*, in 1762. 6 Bro. P. C. 181.

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atheism, blasphemy, and reviling the Christian religion, there have been instances of persons prosecuted and punished upon the common law; but bare non-conformity is no sin by the common law: and all positive laws, inflicting any pains or penalties for non-conformity to the established rites and modes, are repealed by the act of toleration; and dissenters are thereby exempted from all ecclesiastical censures. What bloodshed and confusion have been occasioned, from the reign of Henry IV., when the first penal statutes were enacted, down to the revolution in this kingdom, by laws made to force conscience. There is nothing certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution. It is against natural religion, revealed religion, and sound policy. Sad experience, and a large mind, taught that great man, the president De Thou, this doctrine; let any man read the many admirable things which, though a Papist, he hath dared to advance upon the subject, in the dedication of his history to Henry IV. of France (which I never read without rapture); and he will be fully convinced, not only how cruel, but how impolitic it is to persecute for religious opinions. As a subject of Great Britain, I should not have been sorry if France had continued to cherish the Jesuits, and to persecute the Huguenots. There was no occasion to revoke the edict of Nantz; the Jesuits needed only to have advised a plan similar to what is contended for in the present case; make a law to render them incapable of office; make another to punish them for not serving. If they accept, punish them; if they refuse, punish them; if they say yes, punish them; if they say no, punish them. My lords, this is a most exquisite dilemma, from which there is no escaping; it is a trap a man cannot get out of; it is as bad persecution as that of Procrustes: if they are too short, stretch them; if they are too long, lop them."[u]

To the principles contained in this judgment may be added the following opinion of Mr. Justice Blackstone. The sin of schism, he says, as such, is by no means the object of temporal coercion and punishment. If, through weakness of intellect, through misdirected piety, through perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical

[u] See this judgment more fully, 6 Bro. P. C. 181. And also 2 Burn's E. L. 217.

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establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are such as threaten ruin or disturbance to the state. He is bound, indeed, to protect the established Church: and, if this can be better effected, by admitting none but its genuine members to offices of trust and emolument, he is certainly at liberty so to do: the disposal of offices being matter of favour and discretion. But this point being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy, and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and colour of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.[x]

The admission of none but genuine members of the Church of England to offices of trust and emolument, which, in the above passage, is spoken of with a rather doubtful approbation, by Mr. Justice Blackstone, and which was the occasion of the above judgment or expressed opinion of Lord Mansfield, has, since the time of those lawyers, undergone a complete alteration: and such a mode, if ever it could have been effectual to protect the established religion, is abolished by the effect of the statute 5 Geo. IV. c. 17.

In ecclesiastical matters.

And not only are Protestant dissenters exempt from any disability, in matters of a civil nature, but also in other matters, which are more peculiarly of ecclesiastical cognisance, they are placed under no other restrictions, than such as are imposed on members of the Established Church.

Thus it is, as has been already shown, in the important subject of baptisms, of marriages, and of burials; for those who are baptised by dissenters, so long as certain forms are observed, are held to be validly and sufficiently baptised, and to be entitled to all the privileges of baptised persons. So marriages between dissenters may be solemnised without the intervention of a clergyman, or any resort to a church or chapel of the Established Church. And all Christians, without distinction, so long only as they have been sufficiently baptised, are entitled to burial in the churchyard of their parish church; and even to have the funeral service performed by a clergyman of that Church of England, from the doctrines of which they have dissented while living.[y]

[x] 4 Black. Comm. 52. [y] See *Kemp* v. *Wickes*, and *Mastin* v. *Escott*, ante.

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The law specially relaxed to meet the case of dissenters.

And, in fact, the principle upon which Protestant dissenters are now treated, as to all civil matters, by our laws, can no longer be properly termed toleration. For with so much favour are they regarded, that where any sect of dissenters have voluntarily, and by their own peculiar opinions and regulations, put themselves out of the ordinary protection of the law, the law has been relaxed and altered for their especial favour and protection, and to meet their particular case. Thus we declare, by our 39th article, that the Christian religion does not prohibit but that a man may swear when the magistrate requires; and, accordingly, upon many different occasions oaths are prescribed and required to be taken by our law; nor would any member of the Church of England be excused, or have any favour shown to him, though he should express his conscientious scruples to take an oath, upon any of such occasions. But, with respect to Quakers and Moravians, who express the same scruples to take an oath, they have been relieved, by different statutes, from the necessity, in particular cases; and a simple affirmation, made by them, has been allowed to have the same effect. And now, by a recent statute, it has been declared that every person of the persuasion of the people called Quakers, and every Moravian, be permitted to make his or her solemn affirmation or declaration, instead of taking an oath, in all places and for all purposes whatsoever where an oath is or shall be required, either by the common law, or by an act of parliament already made, or hereafter to be made; which affirmation, or declaration, shall be of the same force and effect, as if he or she had taken an oath in the usual form. But a prescribed form of affirmation is required, and parties affirming falsely are guilty of perjury.[x]

Scruples to taking oaths.

And by another statute, passed in the same year as that last mentioned, the same favour and indulgence is extended to a class of people called Separatists.[y]

Exemption from serving certain offices.

By various acts of parliament, Quakers are exempted from offices opposed to their religious scruples: and if Protestant dissenters are appointed to any parochial or ward office, who scruple to take on themselves such offices, in regard to the oaths, or other matter or thing required by law to be taken or done, respecting such office, they are permitted to execute the same by a sufficient deputy, to be provided by them, who will comply with the laws in that behalf; such deputy being allowed and approved in

[x] 3 & 4 Will. 4, c. 49, s. 1. [y] 3 & 4 Will. 4, c. 82.

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the same manner as the officers themselves should, by law, have been allowed and approved,[z] or, as it would seem from a late decision, they might refuse either to accept the office or to appoint a deputy.[a]

But while, on the one hand, they may refuse to accept and to take upon themselves the burden of these offices, there is nothing, on the other hand, to prevent or restrain them from exercising such offices, if they are properly chosen for them; so that, as the law now stands, it appears that they have the option of refusing or accepting the office, according, it may be, as any advantage therefrom may appear to be derivable to themselves, or to their sect, while members of the Established Church can neither exercise such option for themselves, nor prevent the exercise of it by dissenters.

Objections to pay tithes. Quakers.

Among other conscientious objections to obeying the laws of their country, which are usually felt by Quakers, is that of objecting to permit the tithe-owner to receive his tithes; or rather, to put the case more fairly, it is one of the principles of this sect to endeavour to appropriate to themselves, out of the produce of the lands cultivated by them, a greater proportion by one tenth than that to which they are legally or morally entitled. Such a scruple required a strong interposition of the law, and it has therefore been enacted by several statutes,[b] that any Quaker, objecting to pay tithes, rates, &c. in amount under £50, may, on complaint of any person entitled to receive or collect such tithes, &c., be summoned before two justices, who are to ascertain what is due, and, by order under hands and seal, to direct payment to be enforced by distress and sale. And, by the statute 5 & 6 Will. IV. c. 74, it is enacted, that no suit against Quakers shall be instituted in any courts having cognizance of such matters, for any tithes, compositions, or ecclesiastical demands whatsoever, of or under the value of £50, but that all complaints touching the same shall be decided under the provisions of the above mentioned statutes; and these provisions have since been by the statute 4 & 5 Vict. c. 36, extended to ecclesiastical courts; and the jurisdiction of those courts also, in all matters relating to tithes, &c., of or under the amount before mentioned, has been taken away. But the mode of recovering the tithes or rent charge thus declared to be due from Quakers has been more particularly spoken of under the subject of tithes.[c]

[z] 1 Will. & M., sess. 1, c. 18, s. 7.
[a] See *Adey* v. *Theobald*, ante, Book I. Chap. VIII. Sect. 2.
[b] 7 & 8 Will. 3, c. 34; 1 Geo. 1, c. 6; 27 Geo. 2, c. 137; 53 Geo. 3, c. 127.
[c] Ante, Book II. Chap. II. Sect. 10.

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The laws respecting the religious worship of dissenters have also undergone considerable alteration, with the changing spirit of the times. Here, too, it will be unnecessary to speak of those laws, which no longer exist. The laws respecting the meeting houses, and ministers of Protestant dissenters, at the present day, are as follows.

Laws affecting their religious worship.

No congregation or assembly for the religious worship of Protestants, at which are present more than twenty persons, in addition to the family and servants of the person on whose premises they assemble, or of Quakers, not more than four persons beside the family, &c., is permitted; if not duly certified under some act or acts (under which act or acts the Quakers must still certify), unless the place of meeting be certified to the bishop, to the archdeacon, or to the justices of the peace, at the general or quarter sessions. And all such places shall be registered in the Bishop's or Archdeacon's Court respectively, and recorded at the general quarter sessions, by the registrar, or clerk of the peace; and the bishop, or registrar, or clerk of the peace, must give a certificate thereof to any person demanding the same, for which 2*s.* 6*d.* only is the fee.[d]

Certified meeting houses.

Any Protestant dissenter may certify a meeting house, under these acts.[e] The duty of registering is purely ministerial, and a mandamus issues against the person on whom it devolves, to compel performance.[f] But no assembly for religious worship, requiring a certificate, may be held in any place with the door fastened, so as to prevent any persons entering.[g]

Dissenting teachers.

All persons teaching, preaching, or officiating, in any congregation, or assembly, for the religious worship of Protestants, (that is dissenters, and not ministers of the Church of England,[h]) *whose place of worship is duly certified according to law*, are now as fully exempted, without precedent qualification, unless they have been legally required to qualify, from the penalties of any acts relating to religious worship, as those who take the oaths mentioned in the Toleration Act, or any other act amending that act. Provided, that if any such person, not having taken the oaths to government, and subscribed the declaration against transubstantiation, which latter, however, he is now no longer required to do,[i] shall, when required by any one justice of the peace, by writing under his hand, or signed by him, continue to teach, or preach, in any such con-

In certified places.

[d] 52 Geo. 3, c. 155, s. 2.
[e] *Green and others* v. *Pope*, 1 Lord Raym. 125.
[f] *R.* v. *Justices of Derbyshire*, 1 Bla. Rep, 606.
[g] 52 Geo. 3, c. 155, s. 11. [h] *Trebec* v. *Keith*, 2 Atk. 498. [i] 10 Geo. 4, c. 7.

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gregation or assembly, without taking the said oaths, he shall forfeit, for each offence, a sum not exceeding ten pounds, nor less than ten shillings, at the discretion of the convicting justice.[k] But no person is required to go farther than five miles from his place of residence, at the time of such requisition, for the purpose of qualifying.[l]

Teachers, &c. qualifying. Certificate.

Any of his majesty's Protestant subjects may require the justice to administer such oaths, on producing a printed or written copy, which the justice is to attest, and to deliver to the clerk of the peace.[m] And every justice, before whom any person shall make such oaths and declaration, shall forthwith give him a certificate thereof in a certain prescribed form,[n] which certificate shall be conclusive evidence, that the party, therein named, has taken, and subscribed, the oaths and declaration by the act required.[o]

Preaching to an unlawful assembly.

Preaching to an assembly consisting of more than the lawful number,[p] in any place, without the consent of the occupier thereof, or in any place with the door locked, bolted, barred, or otherwise fastened, so as to prevent any person entering therein during the time of meeting, on conviction, by the oath of one or more witnesses, is punishable by forfeiture, for each offence of the first class, of a sum not exceeding thirty pounds, nor less than forty shillings, and of the second class, of a sum not exceeding twenty pounds, nor less than forty shillings, at the discretion of two or more convicting justices.[q]

A teacher not wholly employed in the duties of teaching must take oaths at sessions.

If a dissenting minister does not employ himself wholly and solely in the duties of a teacher, or preacher, but follows some trade, the later statutes do not extend to alter the Toleration Act[r] in exempting him from civil offices. He must therefore still qualify under that act, in order to be exempt. By that act it is declared that every teacher or preacher in holy orders, or pretended holy orders, being teacher or preacher of a separate congregation,[s] who takes the oaths to government, at the general or quarter sessions for the county, or division, where he lives, and also subscribes the Thirty-nine Articles, except the thirty-fourth, thirty-fifth, and thirty-sixth, and these words of the twentieth article, viz. "the Church hath power to decree rites or ceremonies, and authority in controversies of faith;" or in case he scruples the baptising of infants, except also part of the twenty-seventh article, touching infant baptism; is

[k] 52 Geo. 3, c. 155, s. 5.
[l] Ibid. s. 6.
[m] Sect. 7.
[n] See Appendix.
[o] See 2 Burn's E. L. 192.
[p] See ante.
[q] 52 Geo. 3, c. 155.
[r] 1 Will. & M. st. 1, c. 18.
[s] *Reg.* v. *Justices of Gloucestershire*, 15 East, 676.

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exempted from being chosen or appointed to the office of churchwarden, overseer of the poor, or any other parochial or ward office, or other office in any hundred, city, town, parish, or division, whether the same were in being at the time of the passing of this enactment, or has been subsequently created.[q]

Who may require to have the oath administered to him.

Any person, pretending to holy orders, is entitled to require of the sessions to have the oaths ministered to him, although he may not also be the teacher or preacher of a separate congregation of Protestant dissenters; and, where the sessions had refused to allow a person to take the oaths, on the ground that he had not the conjoint qualification, the Court of Queen's Bench granted a mandamus to them to administer to him the oaths, or to enable them to make a special return of the grounds of their refusal.[r]

When sessions may not refuse.

Neither have the sessions any authority to require of a person claiming to take the oaths, and to make and subscribe the declarations, &c. therein mentioned, as a teacher of a separate congregation of Protestant dissenters, and to verify the same claim upon oath, that he should produce a certificate from two of his congregation, authenticating such his appointment, in compliance with a general rule before made at the sessions for that purpose.[s]

And every such person, being a preacher, or teacher, of any congregation, and scrupling to subscribe his assent to any of the articles aforesaid, who makes and subscribes the declaration of Protestant belief, is entitled to the same exemptions from civil service, and from serving in the militia: and the justices, at the general sessions for the county or place where he lives, are required to administer the declaration to such persons offering to make and subscribe the same, and thereof to keep a register; and for the entry thereof, with the oaths and other declarations aforesaid, a fee of sixpence only is due; and an additional fee of sixpence for any certificate of the same.[t]

Exemption from serving, or providing a substitute, in the militia, is also granted to every teacher of any separate congregation, who has been licensed twelve months at the least, before the yearly meeting of the lieutenancy of the county in October, under the Militia Act.[u]

Ministers employed solely in duties of teaching.

But if a dissenting minister is not engaged in trade, he is, by the stat. 52 Geo. III. c. 155, exempted without the necessity of qualifying as last mentioned; for it is thereby

[q] Sect 11. See *Adey* v. *Theobald*, ante; and, query, whether he would not, under any circumstances, be held exempt.

[r] 15 East, 577.

[s] Ibid. 590.

[t] 19 Geo. 3, c. 44.

[u] 43 Geo. 3, c. 10.

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enacted, that every person who teaches, or preaches, in any congregation or assembly for religious worship, whose place of worship is duly certified, according to law, and who employs himself solely in the duties of a teacher, or preacher, and follows no trade, or other employment, for his livelihood, except that of a schoolmaster, and who produces a certificate of some justice of the peace of his having taken the oaths to government, &c., shall be exempt from the civil services, and offices specified in the Toleration Act, and from serving in the militia, or local militia, of any place, in any part of the United Kingdom. The production of a false certificate, for the purpose of claiming exemption from civil or military duties, subjects the party to a penalty, for each offence, of fifty pounds, recoverable by any person who will sue for the same. But such actions must be brought within three months after the offence. The persons described in this section are also exempted from serving on juries.[x]

Protection of the religious worship of dissenters.

If any person shall, willingly and of purpose, maliciously or contemptuously, come into any cathedral or parish church, chapel, or other congregation permitted by the Toleration Act, and disquiet or disturb the same, or misuse any preacher or teacher, he shall, upon proof thereof, before any justice of the peace, by two witnesses, find two sureties, to be bound by recognisance in the penal sum of fifty pounds, and, in default of such sureties, shall be committed to prison till the next sessions; and, upon conviction at the sessions, shall suffer the penalty of twenty pounds to the king.[y]

A person who had been committed under this clause of the Toleration Act, by an agreement between himself, the prosecutor, and the committing magistrates, was discharged before the time of trial, and brought his action against the magistrate for false imprisonment; upon which occasion Lord Ellenborough said, "The Toleration Act, in order to protect religious congregations, in the exercise of their worship, has annexed a penalty of twenty pounds on persons guilty of disturbing them; and, in order to secure the public in the interval between the commission of the offence, and the trial of the offender, it has required the magistrate, before whom the complaint is lodged, to take security from the offender, or, in default of giving such security, to commit him to the next sessions. Then, instead of abiding the time of his delivery, when he should be discharged, in due course, after trial, in case he established his innocence, he stipulates with the prose-

[x] See *Knowles* v. *Knowles*, Willes, 463. [y] Toleration Act, sect. 18.

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cutor, and the committing magistrates, that the prosecution shall be dropped, and that he shall be discharged for want of prosecution. Such an agreement has a tendency to produce impunity for the commission of the offence, which the legislature meant to prevent; it stops the means of the crown to recover the penalty of twenty pounds, in case the plaintiff has been prosecuted and found guilty.[z]

The above provision of the Toleration Act applies equally to all dissenters, but the enactment next following, and which, to a certain extent, supersedes the former, is not applicable to the meetings of Quakers.

Present law for protection, &c., except in the case of Quakers.

Any person charged before a justice, by two witnesses, with wilfully disturbing a meeting, authorised under the 52 Geo. III. c. 155, or any other act, or molesting any person officiating thereat, or persons there assembled, must find two sureties in fifty pounds, in default of which he is to be committed till the next succeeding general or quarter sessions, on conviction at which he incurs a penalty of forty pounds, to be levied by distress, half to go to the informer, and half to the poor of the parish. If there be no distress, he may be committed for not exceeding three months. The penalty must be sued for within six months.[a]

[z] *Edgcomb* v. *Rood*, 5 East, 301. [a] 52 Geo. 3, c. 155, ss. 12, 15, 17.

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BOOK VIII.

OF OFFENCES AGAINST RELIGION.

THE number of various offences which might possibly be classed under this head would obviously be much greater than those which will be here alluded to. It is intended here to speak of three classes of offences only; as those which immediately concern the subject of the present work. First, such offences as so openly transgress the precepts of religion, natural or revealed, as, by their bad example and consequences, to transgress the law of society also, and which are therefore punishable by human institutions; secondly, such offences as affect the Established Church; and, thirdly, such offences as may be committed by the clergy of that Church, and having the character of offences not so much from the act itself as from the person by whom it is committed; and who, in his character as a clergyman, becomes amenable to certain laws in relation to the duties of his office.

Apostasy. Of the first class is apostasy, or a total renunciation of Christianity by embracing a false religion or no religion at all; which offence can only take place in such as have once professed the true religion. And if any person educated in, or having made profession of, the Christian religion, shall, by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years imprisonment without bail. To give room however for repentance, if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.[a]

Blasphemy. Another offence of this class is blasphemy against the Almighty, by denying his being or providence; or by con-

[a] 4 Bla. Com. 44; 9 & 10 Will. 3, c. 32.

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tumelious reproaches of our Saviour Christ. Whither also may be referred all profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule: and all seditious words spoken in derogation of the Christian religion. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment, for Christianity is part of the laws of England.[b] Rational and dispassionate discussion is allowable, and the courts would not intermeddle with controverted points, but to write against Christianity in general is a clear offence.[c] The publication or exhibition of blasphemous books or pictures is consequently indictable and punishable at common law.[d]

Punishable at common law.

And although the suppression of blasphemy and profaneness is provided for by the statute, yet this does not change the nature of that which was previously an offence at common law; the statute is merely cumulative, and the common law offence, prosecution, and punishment, remain as before.[e]

Blasphemous libels.

Where the blasphemy is contained in any libel, and the offender has been once convicted of the offence, he may, by 60 Geo. III. & 1 Geo. IV. c. 8, on a second conviction before any commission of oyer and terminer, or gaol delivery, or in K. B., be banished from all parts of his majesty's dominions, for such term of years as to the court shall seem proper. If he shall not depart from the united kingdom within thirty days after sentence pronounced, for the purpose of going into banishment, he may be conveyed to such parts out of his majesty's dominion, as his majesty, by the advice of his privy council, may direct. And if at any time after forty days from sentence pronounced, and before the expiration of the term of banishment, he be found at large without lawful cause in any part of his majesty's dominions, he may be sentenced to transportation for fourteen years. By the same statute a power is given to the court in case of conviction for a blasphemous libel, to direct the seizure of all copies of the work in the possession of the defendant, or of any one as his trustee; if the judgment be arrested or reversed, the copies are to be restored free of expense; if not, they are to be disposed of as the court shall order.[f] And in addition to the above statutes, any person unlawfully exposing to view in any street, road, highway, or public place, any obscene print, picture,

[b] 4 Bla. Com. 59; 1 Hawk. P. C. c. 5. [c] *R. v. Carlile*, 2 B. & A. 161.
[d] Ibid. [e] Ibid. [f] 4 Bla. Com. 59, Coleridge's ed. n.

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or other indecent exhibition, or wilfully exposing the same to view in the window or other part of any shop or other building situate in any such place, is punishable as a rogue and vagabond.[g]

Sabbath breaking.

Another offence of this class is that of nuisance in an open profanation of the Lord's day by keeping shop. Particular instances of such profanation are by several statutes made punishable before magistrates; but it would not be possible to enter into them here. The law may be taken generally as laid down by Littledale, J., in his charge to the grand jury of Middlesex in 1837, namely, that Sunday trading, if carried on to any extent which creates a nuisance or obstruction, is indictable at common law; but that a mere act of selling on the Lord's day is not now more indictable than it has been for the last seven hundred years.[h]

As a general rule no person is allowed to work on the Lord's day, but several statutes allow the necessary exercise of certain trades within certain limits.

Simony.

The offence of simony may be also considered as of this class, which, so far as it affects presentations to or resignations of benefices, has been already considered in speaking of those subjects, but, besides its effect upon the thing dealt with, it is in itself a punishable offence, as well by reason of the sacredness of the charge which is thus profanely bought and sold, as because it is always attended with perjury in the person presented.[i] The statute 31 Eliz. c. 6, enacts, that if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two years value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same. If persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or other corrupt consideration. And persons who shall corruptly ordain or license any minister, or procure him to be ordained or licensed, (which is the true idea of simony,) shall incur a like forfeiture of forty pounds; and the minister himself of ten pounds, besides an incapacity to hold any ecclesiastical preferment for seven years afterwards.[k]

Offences against the Established

Of the second class of offences, or such as affect the Esta-

[g] 5 Geo. 4, c. 83; 1 & 2 Vict. c. 38.
[h] Dickenson's Quarter Sess. 387.
[i] See ante, "Simoniacal Presentations."
[k] 4 Bla. Com. 61.

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blished Church and form of worship, the laws against heretics, papists, and non-conformists, would formerly have been those principally to be noticed. Of these, however, almost all have been repealed, and the few that in a modified shape remain, have been already mentioned in speaking of dissenters. Church and form of worship, &c.

Reviling the ordinances of the Established Church is, as Blackstone observes, a crime of a much grosser nature than mere non-conformity. But, after alluding to the statutes which are directed against this offence, he adds, these penalties were framed in the infancy of our present establishment, when the disciples of Rome and Geneva united in inveighing with the utmost bitterness against the English liturgy; and the terror of these laws (for they seldom if ever were fully executed) proved a principal means under Providence of preserving the purity as well as decency of our national worship.[l] It would appear therefore unnecessary to allude further to laws which would seem practically to be not in force at the present day; and probably any such offences as would be now punishable by them might be referred to the first class of offences against religion already mentioned.

Religious impostors may be here mentioned — whom Blackstone describes to be such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. And all such would now probably be included under the definition of *rogues and vagabonds*; for every person pretending or professing to tell fortunes, or using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of her majesty's subjects, may be committed to the house of correction as a rogue and vagabond by any justice of the peace, there to be kept to hard labour for any time not exceeding three calendar months.[m] Religious impostors.

Affrays in a church or churchyard may also be considered as offences of this class. These have always been deemed very heinous offences; as being very great indignities to the divine Majesty, to whose worship and service such places are immediately dedicated. And therefore all irreverent behaviour there has been esteemed criminal by the makers of our laws, so that many disturbances in these places are visited with punishment, which, occurring elsewhere, would not be punishable at all.[n] Thus quarrelling, chiding, or brawling in any church Brawling, &c.

[l] 4 Bla. Com. 50.
[m] 5 Geo. 4, c. 83, s. 4.
[n] 1 Russ. on Crimes, 297.

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or churchyard, is an offence for which the offending party may be proceeded against in the ecclesiastical court.[o] But the offence is not created by the statute only; for the general ecclesiastical law protects the sanctity of public worship; and the ecclesiastical court has a right to interfere to correct or punish any act of disturbance. A party may therefore proceed either upon the statute or upon the ancient law.[p] And it may be stated generally that any quarrel or disturbance within a church amounts to brawling. A vestry-room which stands on consecrated ground is equally under the jurisdiction of the ecclesiastical court: but it is deemed of inferior sanctity, and an offence of this kind committed there is consequently of a comparatively slight ecclesiastical character.[q] The punishment for this offence, except only where it is committed by a clergyman,[r] is only that of temporary suspension *ab ingressu ecclesiæ:* and, as in cases of assault, &c., other modes of redress would be open to parties, the proceeding in the ecclesiastical court would appear of little use.

Disturbing the congregation during the time of divine service would generally be an offence of the kind last mentioned; but if any party should wilfully, maliciously or of purpose molest the minister during the time of divine service he would be indictable under the stat. 1 M. sess. 2, c. 3.

It was said by Abbott, C. J., that where it was not clear that a party who had disturbed the congregration by unlawfully reading a notice had done so with a view of purposely molesting the minister, he might have been removed from the church, but ought not to have been detained in custody in order that he might be taken before a justice.[s]

Arresting clergyman.

It is also an offence to arrest a minister even while going to or from the place of performing divine service; for it is enacted, that if any person shall arrest any clergyman upon any civil process while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award.[t]

[o] 5 & 6 Edw. 6, c. 4.
[p] Rogers's E. L. 117.
[q] Sir J. Nicholl in *Lee* v. *Matthews*, 3 Hagg. 176.
[r] See infra.
[s] *Williams* v. *Glenister*, 2 B. & C. 699.
[t] 9 Geo. 4, c. 31, s. 23.

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Offences by clergymen.

The third class of offences, or such as may be committed by clergymen, have been spoken of in different parts of the present work, especially under the head of Church Discipline; and it would therefore appear unnecessary to recapitulate them here. It may be observed, however, that the offence of brawling above mentioned is considered more serious when committed by a clergyman than by a layman. And a clergyman may therefore be suspended for this offence for such time as the ordinary shall think fit, and his benefice may be sequestered.[u] What deviations from the prescribed form of public worship would be deemed to be brawling has been already spoken of.[x]

[u] 1 Hagg. Cons. 181.

[x] See ante, "Public Worship."

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APPENDIX.

No. 1.

Forms of Testimonials necessary for Candidates for Orders.

LETTERS testimonial from his college. Or, in case the candidate shall have quitted college, he must also present letters testimonial for the period elapsed since he quitted college, in the following form, signed by three beneficed clergymen, and countersigned by the bishop of the diocese in which their benefices are respectively situate; if they are not beneficed, in the diocese of the bishop to whom the candidate applies for ordination.

To the Right Reverend ———, by divine permission Lord Bishop of ——— [*the bishop in whose diocese the curacy conferring the title is situate*]. Whereas our beloved in Christ, A. B., bachelor of arts [*or other degree*], of ——— college, in the university of ———, hath declared to us his intention of offering himself as a candidate for the sacred office of a deacon, and for that end hath requested of us letters testimonial of his good life and conversation; we, therefore, whose names are hereunto subscribed, do testify that the said A. B. has been personally known to us for the space of ——— last past; that we have had opportunities of observing his conduct; that during the whole of that time we verily believe that he lived piously, soberly, and honestly, nor have we at any time heard any thing to the contrary thereof, nor hath he at any time, as far as we know or believe, held, written or taught any thing contrary to the doctrine or discipline of the United Church of England and Ireland; and moreover we believe him in our consciences to be, as to his moral conduct, a person worthy to be admitted to the sacred order of deacons.

In witness whereof we have hereunto subscribed our names this ——— day of ——— in the year of our Lord one thousand eight hundred and ———.

C. D., Rector of ———.
E. F., Vicar of ———.
G. H., Rector of ———.

Form of notice of "si quis," and of the certificate of the same having been published in the church of the parish where the candidate usually resides, to be presented by the candidate if he shall have quitted college.

Notice is hereby given, that A. B., bachelor of arts [*or other degree*], of ——— college, Oxford [*or* "Cambridge"], and now resident in this parish, intends to offer himself a candidate for the holy office of a deacon at the ensuing ordination of the Lord Bishop of ———, and if any person knows any just cause or impediment, for which he ought not to be

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admitted into holy orders, he is now to declare the same, or to signify the same forthwith to the Lord Bishop of ———.

We do hereby certify that the above notice was publicly read by the undersigned C. D., in the parish church of ———, in the county of ———, during the time of divine service on Sunday, the ——— day of ——— last [*or* "instant"], and no impediment was alleged.

Witness our hands, this ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

C. D., Officiating Minister.
E. F., Churchwarden.

Certificate from the divinity professor in the university, that the candidate has duly attended his lectures.

Certificate of the candidate's baptism, from the register book of the parish where he was baptised, duly signed by the officiating minister, to show that he has completed his age of 23 years.

No. 2.

Nomination as a Title for Orders, if Incumbent non-resident.

To the Right Reverend ———, Lord Bishop of ———. These are to certify to your lordship that I, C. D., rector [*or* "vicar," &c.], of ——— and your lordship's diocese of ———, do hereby nominate A. B., bachelor of arts [*or other degree*], of ——— college, in the university of ———, to perform the office of curate in my church of ——— aforesaid, and do promise to allow him the yearly stipend of ——— pounds, to be paid by equal quarterly payments, with the surplice fees, amounting on an average to ——— pounds per annum, [*if they are intended to be allowed,*] and the use of the glebe house, garden, and offices, which he is to occupy [*if that be the fact: if not, state the reason, and name where, and at what distance from the church the curate purposes to reside*]; and I do hereby state to your lordship that the said A. B. does not intend to serve as curate any other parish, nor to officiate in any other church or chapel [*if such be the fact, otherwise state the real fact*]; that the net annual value of my said benefice, estimated according to the act of parliament 1 & 2 Vict. c. 106, ss. 8 and 10, is ——— pounds, and the population thereof, according to the latest returns of population made under the authority of parliament, is ———; that there is only one church belonging to my said benefice [*if there be more, state the fact*]; and that I was admitted to the said benefice on the ——— day of ———, 18—. And I do hereby promise and engage with your lordship, and the said A. B., that I will continue to employ the said A. B. in the office of curate in my said church until he shall be otherwise provided of some ecclesiastical preferment, unless, for any fault by him committed, he shall be lawfully removed from the same; and I hereby solemnly declare that I do not fraudulently give this certificate to entitle the said A. B. to receive holy orders, but with a real intention to employ him in my said church, according to what is before expressed.

Witness my hand, this ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

[*Signature and address of*] C. D.

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Declaration to be written at the foot of the nomination.

We, the before-named C. D. and A. B., do declare to the said Lord Bishop of ——— as follows, namely:—I, the said C. D., do declare that I bonâ fide intend to pay, and I, the said A. B., do declare that I bonâ fide intend to receive, the whole actual stipend mentioned in the foregoing nomination and statement, without any abatement in respect of rent or consideration for the use of the glebe house, garden and offices thereby agreed to be assigned, and without any other deduction or reservation whatsoever.

Witness our hands, this ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

[*Signatures of*] { C. D. / A. B.

Nomination as a title for orders, if incumbent is resident.

[*The same form as the last, so far as* "quarterly payments," *then proceed as follows*:]—And I do hereby state to your lordship, that the said A. B. intends to reside in the said parish, in a house [*describe its situation, so as clearly to identify it*] distant from my church ——— miles [*if A. B. does not intend to reside in the parish, then state at what place he intends to reside, and its distance from the said church*]; that the said A. B. does not intend to serve as curate any other parish, nor to officiate in any other church or chapel [*if such be the fact, otherwise state the real fact*]; and I do hereby promise and engage with your lordship [*and so on, in the same form as the last to the end*].

Witness my hand, this ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

[*Signatures of*] { C. D. / A. B.

No. 3.

Form of Declaration merging Tithes, under the statute of 6 & 7 Will. 4, c. 71, when such Merger is declared by a separate instrument; issued by the Tithe Commissioners.

Know all men by these presents, I, ———, of ———, in the county of ———, gentleman, [*or whatever be the party's proper description*], being lawfully seised of an estate in possession in fee simple [*or*, "in fee tail," *as the case may be*], in the tithes, [*or* "rent-charge," *if the declaration is not made till after an agreement for a rent-charge in commutation of such tithes,*] issuing from or arising upon [*or*, "charged upon," *if it be a rent-charge that is to be merged*] the lands hereinafter described, situate in the parish of ———, in the county of ———, (that is to say) [*here describe the lands fully and accurately*], do hereby declare it to be my will and intent that the said tithes [*or*, "rent-charge," *as the case may be*] shall henceforth be absolutely merged and extinguished in the freehold and inheritance of the said lands, according to the provision in that behalf contained in a statute made in the reign of his late majesty King William the Fourth, intituled "An Act for the Commutation of Tithes in England and Wales."

In testimony whereof I have hereunto subscribed my name and affixed my seal this ——— day of ———, in the year of our Lord ———.

[*Signature*] ——— (L. S.)

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Clause merging Tithes,

Which may be introduced into any agreement for commutation, immediately after the recitals stating that a person is seised in possession of an estate in fee simple or fee tail of any tithes.

And the said ——— hereby declares it to be his will and intent, certified by his signature and seal hereunto annexed, that the said tithes shall henceforth be absolutely merged and extinguished in the freehold and inheritance of the said lands.

No. 4.

Stamp Duties upon Collation by any Archbishop or Bishop.

	£	s.	d.
To any ecclesiastical benefice, dignity, or promotion in England, of the yearly value of 10*l.* or upwards, in the king's books	20	0	0
To any other ecclesiastical benefice, dignity or promotion whatsoever in England	10	0	0
Collation, institution, or admission by any presbytery or other competent authority, to any ecclesiastical benefice in Scotland.	2	0	0
Institution granted by any archbishop, bishop, chancellor, or other ordinary, or by any ecclesiastical court, in and to any ecclesiastical benefice, dignity, or promotion in England,			
Where the same shall proceed upon a presentation	2	0	0
And where it shall proceed upon the petition of the patron to be himself admitted and instituted, if the benefice, dignity, or promotion shall be of the yearly value of 10*l.* or upwards, in the king's books	30	0	0
Or if the same shall be of any other description	15	0	0

But such petition shall not be liable to any stamp duty.

No. 5.

Usual Form of a Certificate of Induction.

Memorandum, that on the ——— day of ———, 18—, I, M. N., rector ["vicar," *or* "curate," *as the case may be*], of ——— in the county of ——— and diocese of ———, by virtue of the within written mandate, did induct the within named A. B., clerk, into the real and actual possession of the within mentioned rectory [*or* "vicarage"] of ———, with all the rights, members, and appurtenances thereof. Witness my hand.

The said A. B. was so inducted in the presence of us,
O. P., Churchwardens,
Q. R., [*or* "Inhabitants," *as the case may be.*]

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No. 6.

Questions to be annually transmitted by each Bishop to every Spiritual Person holding any Benefice within his Diocese or Jurisdiction.

1st. What is the name of your benefice?

2nd. In what county?

3rd. Name of incumbent and date of admission?

4th. Is there a glebe house belonging to your benefice?

5th. Were you resident in the glebe house, or, there being no glebe house, or none fit for your residence, were you resident in any and what house appointed by the bishop in his license, during the last year, for the term prescribed by law?

6th. Being non-resident, were you performing the duties of your parish for the said time? If so, state where you resided, and at what distance from the church or chapel.

7th. Were you, in the last year, serving any other church or chapel in the neighbourhood as incumbent? If so, state the name thereof, and the distance from the above-named church or chapel, and when and for how long you served the same.

8th. Were you serving any other church or chapel in the neighbourhood as curate? If so, state the name thereof, and the distance from your own church or chapel, and when and for how long you served the same.

9th. What are the services in your church? Is a sermon or lecture given at every, or which, of such services?

10th. Were these services duly performed last year? If not, for what reason?

11th. What are the services in your chapel or chapels, if any? Is a sermon or lecture given at every, or which, of such services?

12th. Were these services duly performed last year? If not, for what reason?

13th. Have you any assistant curate or curates? If so, state his or their names; also, whether he or they is or are licensed, and the amount of his or their stipend or respective stipends.

14th. If you were non-resident, were you so by license?

15th. If non-resident by license, state the ground of license and the time when it will expire.

16th. If non-resident without license, were you so by exemption?

17th. If non-resident by exemption, state the ground of exemption, and whether such exemption was claimed for the whole year, or during what part thereof?

18th. If you were non-resident, and did not perform the duties of your benefice, what ecclesiastical duties, if any, were you performing, and where do you now reside?

Observe: the foregoing questions are to be answered by every incumbent, whether resident or not.

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Further Questions to be answered, in addition to the foregoing, in case the Incumbent be non-resident.

19th. What is the name of your curate?

20th. Does he reside in the glebe house?

21st. Does he pay, and what, rent or consideration for the use of the glebe house, or is any deduction made on account thereof from the stipend assigned to him in his license?

22nd. If not resident in the glebe house, does he reside in the parish?

23rd. If not resident in the parish, where does he reside, and at what distance from your church or chapel?

24th. Does he serve any other church or chapel as incumbent? If so, state the name thereof, and the distance from your own church or chapel.

25th. Does he serve any other church or chapel as curate? If so, state the name thereof, and the distance from your own church or chapel.

26th. Is he licensed?

27th. What is his salary from you?

28th. Has he, from you, any other allowances or emoluments? State what, and the average value thereof respectively.

29th. What is the gross and what is the net annual value of your benefice?

N. B. All the questions have reference to the year immediately preceding that in which they are transmitted.

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No. 7.

Form of an Entry of Baptism according to the Act.

Baptisms solemnized in the Parish of St. A. in the County of B., in the Year one thousand eight hundred and thirteen.						
When baptised.	Child's Christian Name.	Parents' Name.		Abode.	Quality, Trade, or Profession.	By whom the Ceremony was performed.
		Christian.	Surname.			
1813. 1st *February.* No. 1.	*John, son of*	*William Elizabeth*	*Smith.*	*Lambeth.*	*Carpenter.*	
3rd March. No. 2.	*Ann, daughter of*	*Henry Martha*	*Jones.*	*Fulham.*	*Builder.*	

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No. 8.

Form of Certificate, to be transmitted, by Minister performing Baptism or Burial elsewhere than in Parish Church or Churchyard, to the Minister of the Parish.

I, ———, do hereby certify, that I did, on the ——— day of ———, baptise, according to the rites of the United Church of England and Ireland, ———, son [*or*, "daughter"] of ——— and ———.

To the rector [*or as the case may be*] of ———.

I, ———, do hereby certify, that on the ——— day of ———, A. B., of ———, aged ——— , was buried in [*stating the place of burial*], and that the ceremony of burial was performed according to the rites of the United Church of England and Ireland by me, ———.

To the rector [*or as the case may be*] of ———.

No. 9.

Verification of the Contents of the Register of Baptisms and Burials, to be transmitted to the Registrar with the Copies.

I, A. B., rector [*or as the case is*] of the parish of C. [*or*, "of the chapelry of D."], in the county of E., do hereby solemnly declare, that the several writings hereto annexed, purporting to be copies of the several entries contained in the several register-books of baptisms, marriages, and burials, of the parish [*or* "chapelry"] aforesaid, from the ——— day of ——— to the ——— day of ———, are true copies of all the several entries in the said several register-books respectively, from the said ——— day of ——— to the said ——— day of ———, and that no other entry during such period is contained in any such books respectively, which entries are truly made according to the best of my knowledge and belief.

(Signed) A. B.

The above to be fairly written, without stamp, immediately after the last entry, and the signature to be attested by one, at least, of the church or chapel wardens.

No. 10.

Certificate of Baptism, to be delivered by Minister for the purpose of being taken to the Registrar.

I, *Gilbert Elliott*, *vicar of Barming*, in the county of *Kent*, do hereby certify that I have this day baptised, by the name of *Thomas*, a male child produced to me by *William Green* as the *son* of *William Green* and *Rebecca Green*, and declared by the said *William Green* to have been born at *Marylebone* in the county of *Middlesex*, on the *7th day of January*, 1836.

Witness my hand, this 1st day of December, 1838.

Gilbert Elliott, Vicar.

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No. 11.

Form of Notice, to be given to Registrar in order to obtain his Certificate.

To the Registrar of the District of Hendon, in the County of Middlesex.

I hereby give you notice, that a marriage is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say),

Name.	Condition.	Rank or Profession.	Age.	Dwelling-Place.	Length of Residence.	Church or Building in which Marriage is to be solemnized.	District and County in which the other Party resides when the Parties dwell in different Districts.
James Smith.	*Widower.*	*Carpenter.*	*Of full Age.*	16, *High Street.*	*Twenty-three days.*	*Sion Chapel, West Street, Hendon, Middlesex.*	*Tonbridge, Kent.*
Martha Green.	*Spinster.*		*Minor.*	*Grove Farm.*	*More than a month.*		

Witness my hand, this 6th day of May, 1845. (Signed) JAMES SMITH.

[*The italics in this Schedule to be filled up as the case may be.*]

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No. 12.

Registrar's Certificate.

I, *John Cox*, registrar of the district of *Stepney*, in the county of *Middlesex*, do hereby certify, that on the *sixth* day of *May* notice was duly entered in the marriage notice book of the said district of the marriage intended between the parties therein named and described, delivered under the hand of *James Smith*, one of the parties (that is to say):

Name.	Condition.	Rank or Profession.	Age.	Dwelling Place.	Length of Residence.	Church or Building in which Marriage is to be solemnized.	District and County in which the other Party dwells, where the Parties dwell in different Districts.
James Smith.	*Widower.*	*Carpenter.*	*Of full Age.*	16, *High Street.*	*Twenty-three Days.*	*Sion Chapel, West Street, Stepney, Middlesex.*	*Tonbridge, Kent.*
Martha Green.	*Spinster.*		*Minor.*	*Grove Farm.*	*More than a Month.*		

Date of notice entered, 6th *May*, 1845
Date of certificate given, 27th *May*, 1845

} The issue of this certificate has not been forbidden by any person authorised to forbid the issue thereof.

Witness my hand this 27th day of *May*, 1845. (Signed) *John Cox*, Registrar.

This certificate will be void unless the marriage is solemnized on or before the 6th day of *August*, 1845.

[*The italics in this schedule to be filled up as the case may be.*]

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No. 13.

TABLE of FEES in the Parish of St. Andrew, Holborn, in the City of London, and County of Middlesex, settled and appointed at a Meeting of the Vestrymen of the said Parish, held in the Vestry Room of the Church, the twenty-second November, 1820.

PARISHIONERS.

	Church Vault.		Church Yard.		Upper New Ground.		Lower New Ground.		Shoe Lane Ground.	
	Grown Person.	Child.	Grown Person.	Child.	Grown Person.	Child.	Grown Person.	Child.	Grown Person.	Child.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Rector	1 2 6	1 2 6	0 13 6	0 8 0	0 18 4	0 9 4	0 12 0	0 7 0	0 5 0	0 5 0
Churchwarden	2 15 6	1 7 6	0 5 4	0 5 0	0 6 6	0 6 2	0 4 0	0 3 8	0 1 6	0 1 6
Clerk	0 4 10	0 4 10	0 3 2	0 1 4	0 4 10	0 1 4	0 2 8	0 1 0	0 1 6	0 1 4
Sexton	0 5 8	0 5 8	0 1 6	0 1 2	0 2 6	0 1 2	0 1 6	0 1 2	0 1 6	0 1 2
Gravedigger	0 1 6	0 1 6	0 1 6	0 1 0	0 1 6	0 1 0	0 1 6	0 1 0	0 2 0	0 1 6
	4 10 0	3 2 0	1 5 0	0 16 6	1 13 8	0 19 0	1 1 8	0 13 10	0 11 6	0 10 6

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NON-PARISHIONERS.

	Church Vault.				Church Yard.				Upper New Ground.				Lower New Ground.				Shoe Lane Ground.			
	Grown Person.			Child.			Grown Person.			Child.			Grown Person.			Child.			Grown Person.			Child.		
	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
Rector	1	15	11	1	12	0	1	4	2	0	14	0	1	7	6	0	12	6	0	18	3	0	10	0	0	10	6	0	7	6
Churchwarden	3	19	6	1	19	0	0	9	10	0	9	0	0	9	9	0	8	6	0	6	3	0	6	0	0	5	3	0	4	0
Clerk	0	7	8	0	7	3	0	6	4	0	2	8	0	7	3	0	2	0	0	4	0	0	1	6	0	2	3	0	2	0
Sexton	0	8	6	0	8	6	0	3	0	0	2	4	0	3	9	0	1	9	0	2	3	0	1	9	0	2	3	0	1	9
Gravedigger	0	2	6	0	2	6	0	3	0	0	2	0	0	2	6	0	1	6	0	2	6	0	1	6	0	3	0	0	1	6
	6	13	8	4	9	3	2	5	6	1	10	0	2	10	9	1	6	3	1	13	3	1	0	9	1	3	3	0	16	9

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To the foregoing Dues there is to be added, as occasion requires:—

For the Church Service.				For the Great Bell.				For the Fifth Bell.			
	Parishioners.		Non-Parishioners.		Parishioners.		Non-Parishioners.		Parishioners.		Non-Parishioners.
	£ s. d.		£ s. d.		£ s. d.		£ s. d.		£ s. d.		£ s. d.
Rector	0 5 4	Churchwarden ..	0 8 0	Churchwarden ..	0 9 0		0 13 6	Churchwarden ..	0 4 0		0 6 0
Clerk	0 1 2		0 1 9								
Sexton	0 3 8	Sexton	0 5 6	Sexton	0 1 0		0 1 6	Sexton	0 1 0		0 1 6
	0 10 2		0 15 3		0 10 0		0 15 0		0 5 0		0 7 6

If buried under the Pavement, either in the Churchyard or in Graves near Lane Grounds, then add to the said Fees:—

	Parishioners.	Non-Parishioners.
	£ s. d.	£ s. d.
Rector	0 11 0	0 15 3
Churchwarden	1 0 0	1 8 6
Sexton	0 2 6	0 3 9
Gravedigger	0 1 6	0 2 6
	1 15 0	2 10 0

Leave for Vaults, Stones, &c.

	Upper New Ground.		Lower New Ground.	
	Parishioners.	Non-Parishioners.	Parishioners.	Non-Parishioners.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Vaults	20 0 0	30 0 0	10 0 0	15 0 0
Flat stones	7 0 0	10 10 0	3 10 0	7 0 0
Head and foot stones				

Coffins of every description of metal may be interred on paying an additional fee of 10*l.* for a parishioner, and 20*l.* for a non-parishioner, in addition to the above fees.

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For Marriages, &c.

	Marriage by License.	Marriage by Banns.	For the Offering at Churching.	For Registering every Baptism.	For the Publication of Banns.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Rector	0 12 6	0 6 6	0 1 0	0 1 0	0 1 6
Clerk	0 5 0	0 3 0	0 0 4	0 0 4	0 0 6
Sexton	0 2 6	0 1 0	0 0 2	0 0 2	0 0 0
	1 0 0	0 10 6	0 1 6	0 1 6	0 2 0

	For Extract from the Register.	Inspecting the Register.	For searching Register for one Year.	Every subsequent Year.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.
	0 2 6	0 1 0	0 1 0	0 0 4

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No. 14.

Certificate of Registry of Death.

I, *John Cox*, registrar of births and deaths in the district of *Mary-le-bone, North*, in the county of *Middlesex*, do hereby certify that the death of *Henry Hastings* was duly registered by me on the *seventh* day of *March*, 1845.

John Cox, Registrar.

Order of Coroner for Burial.

I, *James Smith*, coroner for the county of *Dorset*, do hereby order the burial of the body now shown to the inquest jury as the body of *John Jones*. Witness my hand this *eighth* day of *March*, 1845.

James Smith, Coroner.

No. 15.

Certificate that Dissenting Teacher has taken Oaths and made Declaration.

I, *A. B.*, one of her majesty's justices of the peace for the county ["riding," "division," "city" *or* "town," *or* "place," *as the case is*] of ——, do hereby certify, that C. D. of —— [*describing the christian and surname and place of abode of the party*] did this day appear before me, and did make, and take, and subscribe, the several oaths and declarations specified in an act made in the fifty-second year of the reign of King George the Third, intituled [*set forth title of the act.*] Witness my hand this —— day of ——, 1845.

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